Supreme Court of the United States.

OCTOBER TERM, 1894

No. 28

THEOPHILUS KING, ADVERSE CLAIMANT, AND THE LIPPITT WOOLEN COMPANY, ALLEGED TRUSTEE, *Plaintiffs in Error*,

v.

JOHN A. CROSS, GIDEON P. BROWN, EDWARD STEESE AND AMASA CLARKE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

BRIEF FOR PLAINTIFFS IN ERROR.

BRIEF EXTRACT OR STATEMENT OF THE CASE.

This cause comes to this Court from the Supreme Court of the State of Rhode Island, on a writ of error sued out by Theophilus King, adverse claimant, and the Lippitt Woolen Company, alleged trustee, on the ground of federal questions, to reverse the order or judgment of the said Supreme Court of Rhode Island, charging the Lippitt Woolen Company as trustee of the principal defendants in an action in said Court wherein John A. Cross, of Providence, Rhode Island, was plaintiff, and Gideon P. Brown, of Boston, Edward Steese and Amasa Clarke, of Brookline, all in the Commonwealth of Massachusetts, were defendants.

In July and August, 1889, Brown, Steese & Clarke, a firm doing business in Boston, Massachusetts, all the members of which were residents and citizens of Massachusetts, sold certain wool to the Lippitt Woolen Company, a corporation organized and existing under the laws of Rhode Island. The sale was made and the wool delivered in Boston, and the purchase price for the same was there

payable when it should become due. By the terms of the contract of sale, however, none of the purchase price became due and payable until on or after September 12, 1889.

On the 12th of August, 1889, Brown, Steese & Clarke, having become insolvent, duly applied by a voluntary petition to the Judge of the Court of Insolvency in and for the County of Norfolk and Commonwealth of Massachusetts, setting forth their inability to pay all their debts and their willingness to assign all their estate and effects for the benefit of their creditors, and praying that such proceedings might be had in the premises as are provided in Chapter 157 of Massachusetts Public Statutes, that is, the insolvency laws of that Commonwealth. Section 17 of said Chapter 157 provided: "If it appears to the satisfaction of the judge that the debts due from the applicant amount to not less than $200, he shall forthwith issue a warrant under his hand to the sheriff of the county or either of the deputies, directing him forthwith as messenger to take possession of all the estate, real and personal, of the debtor, except such as may be by law exempt from attachment, and all his deeds, books of account and papers, and keep the same safely until the appointment of an assignee." On the 21st of said August, the said judge duly issued a warrant under his hand to a deputy sheriff of the county, directing him forthwith, as messenger, to take possession of all the estate, real and personal, of the debtors, except such as might be by law exempt from attachment, and all their deeds, books of account and papers, and keep the same safely until the appointment of assignees. The first publication of notice of the issuing of said warrant was duly made on the 23d of said August. On the 4th of September following, assignees were duly elected and appointed, and, on the same date, the judge, by an instrument under his hand, duly purported to assign and convey to said assignees all the estate, real and personal, of said debtors, except such as was by law exempt from attachment, and all their deeds, books and papers relating thereto. Sections 46 and 51 of said Chapter 157 further provided: "The assignment shall vest in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned or conveyed, or which might

have been taken on execution by a judgment against him at the time of the first publication of notice of issuing the warrant. . . . *The assignment shall vest in the assignee all debts due to the debtor* or any person for his use, and liens and securities therefor, and all his rights of action for goods or estate, real or personal, and all his rights of redeeming such goods or estate. . . . He shall have the like remedy to recover all the estate, debts and effects in his own name as the debtor might have had if no assignment had been made. In suits prosecuted by the assignee, the assignment by the judge shall be conclusive evidence of his authority to sue." Section 109 of said Chapter 157 further provided: "Suits upon claims sold by assignees shall be brought in the name of the purchasers. The fact of sale and of purchase by the plaintiff shall be set forth in the writ, and the defendant may avail himself of any matter of defense of which he could have availed himself in a suit upon the claim by the assignee. Costs in such suits shall be recovered by and against the plaintiff, and the assignee shall not be liable therefor." The assignees of Brown, Steese & Clarke, by virtue of the assignment to them as aforesaid, and of the provisions of said insolvency laws of Massachusetts, duly purported to sell and assign the claim against the Lippitt Woolen Company to Theophilus King, a citizen and resident of Massachusetts, who, as shown by the duly authenticated record as such purchaser and under and by virtue of said Section 109, brought suit thereon in his own name against the Lippitt Woolen Company and recovered judgment thereon.

As already stated, the date of Brown, Steese & Clarke's application to the Judge of the Court of Insolvency, stating their inability to pay their debts, their willingness to assign all their property and effects, and asking that such proceedings might be had as were provided for in the Massachusetts insolvency laws, was August 12, 1889. The next day, August 13, 1889, the plaintiff, John A. Cross, commenced this action against Brown, Steese & Clarke by service of garnishment on the Lippitt Woolen Company, summoning the Lippitt Woolen Company as an alleged trustee of Brown, Steese & Clarke. The writ was returnable to the Court of Common Pleas, now the Common Pleas Division of the Supreme Court of Rhode

Island. The proceeding was thus effective, if at all, only as a proceeding *quasi in rem* to reach property of the principal defendants; for Brown, Steese & Clarke were not personally subject to the jurisdiction of the Rhode Island Court, nor were they served with process in Rhode Island, the only service on them being by sending, as authorized by the Rhode Island statutes, an attested copy of the writ by mail to their address in Massachusetts. And the property thus sought to be reached was the obligation of the Lippitt Woolen Company to Brown, Steese & Clarke above stated. Although Brown, Steese & Clarke did subsequently appear and submit to the jurisdiction of the Rhode Island Court, they did not so appear or submit to the jurisdiction of that Court until long after the assignment of all their property, debts due them, and rights of action therefor, to their assignees under the insolvency proceedings in Massachusetts, to wit, until January 7, 1890. (Record, p. 110.)

Under and by virtue of Chapter 433 of the Public Laws of Rhode Island (now The Gen. Laws, c. 254, sec. 24) the said King became on his own motion a party to the action as adverse claimant, setting up, as entitled to full faith and credit, the insolvency laws and proceedings thereunder in Massachusetts as aforesaid, and also his judgment against the Lippitt Woolen Company. The Lippitt Woolen Company also, for its protection, was allowed to file additional answers or affidavits setting up, as entitled to full faith and credit, the same insolvency laws and proceedings thereunder and the said judgment against it and asking to be discharged.

The Court, nevertheless, excluded the duly authenticated copies duly offered in evidence by the adverse claimant, as not entitled to full faith and credit with the effect claimed therefor by the adverse claimant; and although, as already stated, the Court allowed the Lippitt Woolen Company, for its protection, to file answers setting up such copies and facts, and by the law of Rhode Island the facts set up in the answer are to be considered as true on the question of charging or discharging, the Court, nevertheless, charged the Lippitt Woolen Company as trustee for the sum of $16,421.26, thereby necessarily refusing to give full faith and credit to such proceedings

with the effect claimed therefor by the said Lippitt Woolen Company and the said King.

Under Chapter 31 of the Judiciary Act (now The Gen. Laws, c. 251), King and the Lippitt Woolen Company, respectively, deeming themselves aggrieved by these directions, rulings and decisions of the Common Pleas Division of the Supreme Court, duly complied with the course of procedure entitling them to have their petitions for a new trial, grounded on such matters, heard before and decided by the Appellate Division of the Supreme Court, which denied the same and remitted the cause with the papers therein to the Common Pleas Division, for entry of judgment, etc. (The Judiciary Act, c. 31, sec. 11.)

SPECIFICATION OF ERRORS RELIED UPON.

(1) That the said Court erroneously charged the Lippitt Woolen Company as trustee in this action, thereby erroneously holding as not entitled to full faith and credit, with the effect claimed therefor by the said Lippitt Woolen Company and the adverse claimant, the duly authenticated record of the Superior Court for the County of Suffolk and Commonwealth of Massachusetts, annexed to and made a part of the supplemental affidavit of the Lippitt Woolen Company (Record, pp. 27, 31, 1-27), and on which the said Lippitt Woolen Company relied as entitling it to a discharge and on which the said adverse claimant relied as merging the debt and establishing his title and exclusive right to enforce the obligation of the Lippitt Woolen Company.

(2) That the said Court erroneously ruled out as not entitled to full faith and credit, with the effect claimed therefor by the adverse claimant as against these garnishment proceedings, the duly authenticated record and judicial proceedings of the Court of Insolvency for the County of Norfolk and Commonwealth of Massachusetts in the case of Brown, Steese & Clarke, insolvent debtors, to wit, of the debtors' petition in said case, dated August 10, 1889, and filed August 12, 1889; of the warrant, dated August 21, the first publication of the notice of issuing whereof was made on August 23,

1889, and of the assignment to the assignees in insolvency, dated the 4th of September, 1889 (Record, pp. 48-52), all being annexed to the petition of Theophilus King, adverse claimant, and to which reference is hereby made, duly offered in evidence by the adverse claimant as tending to prove and establish the title alleged and claimed by him; also the duly authenticated record of the Court of Insolvency for the County of Norfolk and Commonwealth of Massachusetts, in the same case, of the prayer of the assignees in insolvency of Brown, Steese & Clarke for leave to make sale and conveyance of the claims of Brown, Steese & Clarke against the Lippitt Woolen Company and the Wanskuck Company, with the decree of the court thereon, the instrument being undated, but the decree being allowed November 19, 1890 (Exhibit B, Record, p. 80), and the instrument of sale and conveyance from the assignees in insolvency to Theophilus King, made in accordance therewith, being dated the 19th of November, 1890 (Exhibit D, Record, p. 85), to which reference is hereby made, each duly offered in evidence by the adverse claimant as tending to prove and establish the title alleged and claimed by him. (Record, pp. 127-8.)

(3) That the said Court had no power or jurisdiction to discharge or impair the debt or obligation of the Lippitt Woolen Company as against the non-resident creditors to whom due, and parties claiming under them, so long as those creditors were not served with process or subject to the jurisdiction of the court, and especially as against the Massachusetts Court of Insolvency; and the Rhode Island statute, construed as authorizing such a proceeding, was invalid as a statute impairing the obligation of contract.

(4) That the said statute, so construed, was also invalid as depriving the owners of their property without due process of law.

See also the 7th, 8th, 9th, 10th, 11th, 12th, 13th, and 14th grounds for new trial in the adverse claimant's and alleged trustee's petition for new trial, which, under the law of Rhode Island (The Gen. Sts., c. 251) is practically nothing more or less than an assignment of errors relied upon.

BRIEF OF THE ARGUMENT.

I.

PRELIMINARY.

(a)

This Court has Jurisdiction.

The Rhode Island Supreme Court could not charge the Lippitt Woolen Company as trustee without denying full faith and credit to the Massachusetts proceedings with the effect claimed therefor by the adverse claimant and the alleged trustee.

Green v. *Van Buskirk*, 5 Wall. p. 314; 7 Wall. 145.
Crapo v. *Kelley*, 16 Wall. 610, 620-21.
Huntington v. *Attrill*, 146 U.S. pp. 685-6.
Gt. Western Tel. Co. v. *Purdy*, 162 U.S. 329, 335.

As no attachment exists except by statute and as the Rhode Island Supreme Court construed the Rhode Island statute as authorizing a discharge of the debt as against a non-resident not subject to the jurisdiction of the Court, the statute thus construed is unconstitutional, as a law impairing the obligation of contract, within Article I., Section 10, of the Constitution of the United States.

State Tax on Foreign-Held Bonds, 15 Wall. 300, 320-1, 325-6.
Main v. *Messner*, 17 Or. 78, 84.

Again, the statute so construed is unconstitutional, as depriving the owners of their property without due process of law, within Section I. of the Fourteenth Amendment to the Constitution of the United States.

Louisville & N. R. Co. v. *Nash* (Ala.), 41 L. R. A. 331.

But whether the federal question in the case at bar be as to "full faith and credit," "impairing the obligation of contract," "due process of law," or all three of these, each and all of them turn on a single question, namely, the *jurisdiction* of Rhode Island on one hand and of the Massachusetts courts on the other hand, over the debt of the Lippitt Woolen Company to Brown, Steese & Clarke.

In other words, the only ground on which the Rhode Island courts could deny full faith and credit to the Massachusetts records and judicial proceedings was that of want of jurisdiction. If the obligation of the Lippitt Woolen Company to Brown, Steese & Clarke was property in Massachusetts within the dominion and control of the Court at the domicile of the creditors, it passed under the assignment, and the Massachusetts records and judicial proceedings were entitled to full faith and credit, with the effect claimed for them by the adverse claimant and the alleged trustee. If it was property in Rhode Island within the dominion and control of the Court at the domicile of the debtor and held by the attachment, the Massachusetts records and judicial proceedings were not entitled to full faith and credit with the effect claimed therefor by the adverse claimant and alleged trustee.

(b)

"Full Faith and Credit" v. *Comity.*

It is sometimes said that the courts of one State will refuse to recognize involuntary assignments made under the laws of another State. It is important, therefore, to notice the limitations to the application of that doctrine and power. If the property was within the State and subject to the control and jurisdiction of the Court making the assignment, or was constructively there and had not acquired an established situs in another State, then the assignment was valid and effectual everywhere, whether voluntary or involuntary; and the courts of other States, under the clause of the Constitution requiring full faith and credit, could not refuse to recognize it. This was established by —

Crapo v. *Kelly*, 16 Wall. 610.

That case, too, arose under the insolvency laws of Massachusetts; and it was there held, in effect, that all property of the debtor actually situated in Massachusetts, and all property of the debtor constructively in Massachusetts and which had not acquired an established situs in another State, passed under the assignment. The precise property in question was a vessel owned by citizens of Massachusetts, which at the time of the assignment was at sea and which

returned into a New York port and which was there attached before the Massachusetts assignee obtained actual possession.

The Court, among other things, say: "Personal property which has an established situs in another State is no doubt governed by the *lex loci sitae rei*, so far that it will be governed in its distribution by the laws of the place where found rather than the law of the domicile. *This rule only applies where such property has acquired an established situs. Until that occurs, there can be no conflict of jurisdiction.* . . ."

> "This vessel, 'The Artic,' was upon the high seas at the time of the assignment. The situs at that time decides the question of jurisdiction. The State of New York had no jurisdiction over her until long afterward. No conflict can therefore arise between the laws of New York and of Massachusetts" (21 L. ed., p. 438).

> "An adjudication in bankruptcy partakes in part of the nature of a judgment in *rem* and in part of the nature of a judgment in *personam*. With regard to the estate of the bankrupt debtor, which has been, by the Court's warrant of seizure or by the surrender of the debtor, brought within the jurisdiction of the Court, its orders, decrees and judgments as to the right and title to the property or as to the disposition of it among the parties interested, are binding upon all persons and in every Court."

> LAMAR, J., *Abendroth* v. *Van Dolson*, 131 U.S. p. 71.

(c)

Rhode Island Proceeding Effective, if at all, only as a Proceeding Quasi in Rem.

It is also important to notice that the Rhode Island proceeding was effective, if at all, only as a proceeding *quasi in rem*. The principal defendents were citizens and residents of Massachusetts and were not found or served with process in Rhode Island. As against them, therefore, the proceeding was a mere nullity, except

in so far as property of theirs was actually attached and brought within the jurisdiction of the Court.

Pennoyer v. *Neff*, 95 U.S. 714.

Garnishment is a proceeding *quasi in rem;* and property beyond the jurisdiction of the State cannot be attached or held by garnishment.

The principal defendants having submitted themselves and their property to the jurisdiction and control of the Massachusetts Court of Insolvency, they could not afterwards, by appearing in the Rhode Island Court, confer jurisdiction upon the Rhode Island Court over property in Massachusetts, surrendered to the Massachusetts Court. This is well settled.

Reynolds v. *Stockton*, 140 U.S. p. 273.
Ela v. *Edwards*, 13 Allen, 49.
In re Anderson, Fed. Cas. No. 351..

As a matter of fact, at the time of appearing, they had no property to submit to the jurisdiction of the Rhode Island Court; all their property had actually been assigned and vested in their assignees in insolvency.

Mr. Reno, in a recent article in the "American Law Review," to which we shall refer with pleasure as sustaining our main contentions in the case at bar, fell into a clear error in discussing the decision of the Rhode Island Court in this cause, from failure to notice this fact, together with the further fact that the jurisdiction of the Rhode Island Court over the property in question was raised, not by the principal defendants themselves, but by the garnishee and the adverse claimant claiming title to the property under the assignment made in Massachusetts before the principal defendants had appeared and submitted to the jurisdiction of the Rhode Island Court. The error is so evidently the result of oversight that we do not deem it necessary to discuss it further.

32 Am. L. Rev. pp. 45-6.

II.

Debtor's State had no Jurisdiction Over Debt; Creditors' State did Have.

We have already seen that the only ground on which the Rhode Island Court could deny full faith and credit to the Massachusetts records and judicial proceedings was that of want of jurisdiction; and that this question of jurisdiction, again, turned on the question whether Brown, Steese & Clarke's property in the debt of the Lippitt Woolen Company to that firm was at the domicile of the creditors in Massachusetts and subject to the jurisdiction and control of the Massachusetts Courts, or at the domicile of the debtor in Rhode Island and subject to the jurisdiction and control of the Rhode Island Court.

We propose now, by a brief examination of the principles and authorities, to demonstrate that Brown, Steese & Clarke's property in the debt was in Massachusetts and not in Rhode Island; that the debtor's State had no jurisdiction over the debt, and that the creditors' State did have.

Mr. Reno, in the preface to his work on Non-residents and Foreign Corporations, says:

"There is one principle which permeates the law of 'Non-residents and Foreign Corporations,' so far as it treats of the relation of debtor and creditor. That principle is that, when debtor and creditor are residents of different States, the situs of the debt is the creditor's residence and not the debtor's residence; the creditor's State has jurisdiction over the debt, and the debtor's State has not. The result is that the creditor's State has the power to tax the debt or to discharge it by operation of law; but the debtor's State has not this power, because it has no jurisdiction over the debt."

Reno, Non-Res. vi.

The authorities conclusively establish this proposition. In fact, outside of garnishment, the law is now thoroughly established and unquestioned. We propose, therefore, to examine these branches

where the law is now settled and unquestioned to show that on principle and reason the law cannot be different in garnishment.

(a)

INSOLVENCY LAWS.

The sovereign power of a State over property, or rather the absence of any property, within the State, over which the sovereign power of the State can extend in case of a mere debt or pecuniary obligation of a citizen of that State to a citizen of another State, is clearly illustrated and conclusively established by the cases and authorities on the effect of discharges under State insolvency laws.

For "the proposition lying at the foundation of all these decisions is, that the statute of a State, being without force in any other State, cannot discharge a debt held by a citizen of another State."

MILLER, J., *Denney* v. *Bennett*, 128 U.S. p. 497, 32 L. ed., p. 494, and cases.

"The general principle that our insolvency laws could not affect citizens of other States, to whom liabilities were created that followed the person of the creditors, was well understood and practically applied by the court in numerous cases."

Kelley v. *Drury*, 9 Allen, p. 28.

And, notwithstanding the great general conflict that once existed between the various State courts and the United States Supreme Court, it is now finally established that "the insolvency law of one State has no effect against the citizens of another State *holding claims that follow the person of the creditor, no matter where the debt was contracted or where it was made payable*, unless they place themselves under the jurisdiction of the law, voluntarily becoming parties to the insolvency proceedings."

Perley v. *Mason*, 64 N.H. 6; 3 Atl. 629, 630.
Baldwin v. *Hale*, 1 Wall. 223.

"Insolvent laws of one State cannot discharge the contracts of citizens of other States; because such laws have no extraterritorial operation; and consequently the tribunal sitting under

them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceeding, has no jurisdiction of the cause."

CLIFFORD, J., *Gilman* v. *Lockwood*, 4 Wall. 408, 411, 18: 432, 433.

"There being neither jurisdiction of him (the non-resident creditor) or his debt, the decree is a mere nullity so far as it professes to discharge his debt. To hold otherwise would be to condemn him unheard and to appropriate his property 'without due process of law.' This being so, the question in such cases — the discharge of the insolvent being otherwise valid — is simply one of jurisdiction, and the forum in which the remedy is sought cannot affect the principle or alter the rule."

Main v. *Messner*, 17 Or. 78, 84.

In *Denney* v. *Bennett*, *ubi supra*, MILLER, J., after stating that the proposition lying at the foundation of all the decisions is that the statute of a State, being without force in any other State, cannot discharge a debt held by a citizen of another State, added:

"In other words, whatever the court before whom said proceedings are had may do with regard to the disposition of the property of the debtor, it has no power to release him from the obligation of a contract which he owes to a resident of another State, who is not personally subject to the jurisdiction of the court. . . . The authority to deal with the property of the debtor within the State, so far as it does not impair the obligation of contracts, is conceded: *but the power to release him*, which is one of the usual elements of all bankrupt laws, *does not belong to the legislature where the creditor is not within the control of the court.*" (128 U.S. 498.)

So the power to release him, which is not only one of the usual but one of the necessary elements of all garnishment laws, *does not belong to the legislature* where the creditor is not within the control of the court.

In *State Taxes on Foreign-Held Bonds*, 15 Wall. 300, after show-

ing that the debts, so far as held by non-residents of the State, were property beyond the jurisdiction of the State and therefore not subject to the taxing power of the State, the Court went on to show that the law was also invalid as a law impairing the obligation of contracts. On this point FIELD, J., delivering the opinion of the Court, said:

"It is a law which interferes between the company and the bondholder, and under the pretense of levying a tax commands the company to withhold a portion of the stipulated interest and pay it over to the State. It is a law which thus impairs the obligation of the contract between the parties. The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract by imposing new conditions, or dispenses with those expressed, is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement. The Act of Pennsylvania of May 1, 1868, falls within this description. It directs the treasurer of every incorporated company to retain from the interest stipulated to its bondholders five per cent. upon every dollar and pay it into the treasury of the Commonwealth. It thus sanctions and commands a disregard of the express provisions of the contracts between the company and its creditors. It is also one of many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property. *It is, in fact, a forced contribution levied upon property held in other States*, where it is subjected, or may be subjected, to taxation upon an estimate of its full value . . .

"The tax laws of Pennsylvania can have no extraterritorial operation; *nor can any law of that State, inconsistent with the terms of a contract, made with or payable to parties out of the State, have any effect upon the contract whilst it is in the hands of such parties or other non-residents.* The extraterritorial invalidity of State laws discharging a debtor from his contracts with citizens of other States, even though made and payable in the State after the passage of such laws, has been judicially determined by this Court. *Ogden* v. *Saunders*, 12 Wheat. 214; *Baldwin* v. *Hale*, 1 Wall. 223. A like invalidity must, on similar grounds, attend State legislation which seeks to change the obligation of such contracts in any particular, *and on*

stronger grounds where the contracts are made and payable out of the State." (15 Wall. 320-1, 325-6.)

The extraterritorial invalidity of the Rhode Island attachment laws, construed as authorizing the alleged attachment in the case at bar, stands on those stronger grounds; for the contract in question was not only one with citizens of another State, but was made and payable out of the State. And those laws are inconsistent with the terms of the contract, for they not only sanction but command a disregard of the terms of the contract and forbid a payment of the debt where and when it was legally payable, and to the parties to whom it was legally payable (for under the laws of Massachusetts the obligation was in effect negotiable, allowing the assignee to sue in his own name, as was in fact done). The Rhode Island attachment laws so construed (and it is obvious that no right of attachment exists unless and except as authorized by some statute) clearly impair the obligation of the contract between the parties.

And generally the cases on discharges in insolvency as against non-resident creditors establish that the debt is not property within the State over which the sovereign power of the State extends, and that consequently the laws of a State, being without extraterritorial force in other States, cannot discharge a debt held by citizens of another State; that the debt follows the person of the creditor, and neither he nor it are subject to the jurisdiction or laws of the State, and that consequently an application of such laws to such debts and contracts also violate one of two prohibitions of the Federal Constitution: One against laws impairing the obligation of contracts, and the other against depriving a party of his property without due process of law.

The cases on insolvency not only negative any power or jurisdiction of the debtor's State over the debt, but they establish affirmatively the power and jurisdiction of the creditor's State over his property in the debt.

The insolvency laws of Massachusetts, as well as those of other States, are based on this assumption.

See *infra*, p. 52

And this assumption is the fundamental ground on which the power of a State to enjoin creditors from prosecuting attachment suits in another State is sustained.

See *infra*, p. 52

(b)

THE STATUTES OF LIMITATIONS.

Cases and authorities on Statutes of Limitations also afford a striking illustration of the extent of the sovereign power of a State over property, and the fundamental and essential difference in this respect between lands and chattels and mere debts.

For these show that lands and chattels are subject to the jurisdiction and laws of the State in which they are located or kept and used, though the owner be a non-resident of the State: that the State has the power to divest the owner's title to such lands and chattels, and to transfer it to an adverse possessor by operation of law under its limitation laws; and that when the adverse possessor has so acquired title under the operation of those laws, it will be respected and enforced in the courts of other States, and must be so respected under the clause of the United States Constitution requiring full faith and credit to be given.

Reno, *Non-Res.*, sec. 305 and cases.
Chapin v. *Freeland*, 142 Mass. 383, 386 and cases.

But debts are mere personal obligations, and the remedy to enforce them is wholly *in personam*. As the effect of most Statutes of Limitations is merely to bar or prevent the remedy and not to extinguish the debt, and remedies are regulated by the law of the place where they are sought, it has been held to follow that such a bar, although the time of prescription has run before suit without interruption, and while both parties resided in the State, will not prevent a remedy sought in a foreign State in accordance with the law of such foreign State.

See *Thorndike* v. *Thorndike* (Ill.), 32 N.E. 510 and cases.

But when the debtor and creditor are residents of different States, the debt is not subject to the jurisdiction and laws of the debtor's

State, and not only will not, but cannot, be discharged or divested by operation of those laws, even though the Statute of Limitations be one that operates to extinguish the debt or claim.

Canadian Pac. Ry. Co. v. *Johnston* (C. C. A. 2d), 61 F.R. 738, 745-6.
Story, *Conflict of Laws* (7th Ed.), Sect. 582, 582 B.

(c)

ADMINISTRATION PROCEEDINGS.

The principles for which we contend are not generally applicable here. *The owner is dead.* There is no immediate personal representative except one created by the State. And one State can create such a representative just as well as another, and no State can give its representative authority to act in another.

See also *Saunders* v. *Weston*, 74 Me. 85, 89, 90.

The vital and fundamental importance of this distinction between the validity of proceedings where the owner is dead and of those where the owner is alive, is, perhaps, nowhere more clearly pointed out than in those cases where courts, under statutory authority or otherwise, have attempted to administer on the property of a living person as if he were dead and not entitled to notice. The owner is alive and cannot be deprived of his property without due process of law. Hence, all such proceedings and statutes have been held absolutely null and void.

Scott v. *McNeal*, 154 U.S. 49.
Lavin v. *Emigrant, etc., Bank*, 1 F.R. 641.
Bolton v. *Schriever* (N.Y.), 18 L. R. A. 242.
Springer v. *Shavender* (N.C.), 33 L. R. A. 772.
Carr v. *Brown* (R.I.), 38 L. R. A. 294 and cases.

Besides, administration proceedings are often very limited affairs, founded not so much on the existence of property as on the necessity for some action within the State. For example, a citizen of one State was indebted to a citizen of another State at the time of the latter's decease, and that indebtedness was evidenced by a bond or other instrument which is wrongfully withheld by citizens of a third State. Under such circumstances, it may be necessary not

only to take out letters of administration at the creditor's domicile at the time of his decease, but also to take out letters of administration in the third State in order to obtain possession of the bond; and also, after obtaining possession of the bond, to take out letters of administration at the domicile of the debtor for the purpose of enforcing payment of the bond.

See *Atty-Gen.* v. *Bouwens*, 4 M. & W. 191-3.
Ins. Co. v. *Woodworth*, 111 U.S. 145-6.

The principle for which we contend, however, is so far applicable that, by the established rule of international law, the descent and distribution of personal property is governed by the law of the domicile of the owner at the time of his decease.

Of course, it is otherwise with respect to real estate. The validity of any will conveying real estate must be determined by the law of the State where the real estate is situated. (*De Vaughn* v. *Hutchinson*, 165 U.S. 566, 569 and cases.)

And if it is valid and sufficient to convey real estate where situated, he cannot be said to have deceased intestate, although the will was invalid and insufficient to convey personal property by the law of his domicile at the time of his decease. (*In re Earhart* (La.), 23 So. 476.)

(d)

TAXATION.

The decisions on taxation afford the most analogous and conclusive tests possible; and, fortunately, here, as in insolvency, the law has been thoroughly established by the decisions of this Court.

In taxation and attachment, the fundamental proposition is precisely the same, viz., whether the thing sought to be taxed or attached is property within the dominion and subject to the legislative power and control of the State. For all subjects over which the sovereign power of the State extends are objects of taxation, and an attachment, as against the non-resident owner not served with process, is a process *quasi in rem*, and is necessarily based on the fundamental proposition that the thing attached is property within the State over which the sovereign power of the State extends.

It requires no argument to show that the law of taxation, as established and declared by this court, is inconsistent with the law of attachment as declared by certain State courts. The decisions of this Court on taxation and of the State courts on attachments are inconsistent and cannot stand together. Two recent articles in the law reviews, wherein the law as to the situs of debts is carefully and thoroughly reviewed, were written by different parties and from directly opposite points of view, and yet both agree on this, that the decisions on taxation and on attachment are absolutely inconsistent and conflicting, and cannot stand together. One argues that the decisions of this Court on taxation are wrong and must be reversed; the other, that the decisions of certain State courts on attachment are wrong and must be reversed.

Conrad Reno, 32 Am. L. Rev. 34.
Hollis R. Bailey, 11 Har. L. Rev. 95, 112.

It will doubtless be urged that the law of attachment differs from the law of taxation, because, while debts, like personal property, are, for most purposes, deemed attached to the person of the owner so as to have their situs at his domicile, "yet this fiction always yields to laws for attaching the property of non-residents, because such laws *necessarily assume* that the property has a situs distinct from the owner's domicile."

MITCHELL, J., *Harvey* v. *Gt. Northern R. Co.* (Minn.), 17 L. R. A. 84, 88-9.

But so do laws for taxing the property of non-residents necessarily assume that the property has a situs distinct from the owner's domicile. A personal tax against the non-residents would be null and void. The question in each case is, Can the State fix the situs of the debt at the domicile of the debtor, in one case for the purpose of taxation, in the other for the purpose of attachment? If it cannot for the purpose of taxation, it cannot for the purpose of attachment. The power of the State to fix the situs of the debt at the domicile of the debtor for its own support by taxation is at least as great as the power of the State to fix it there for the protection of one of its citizens. This is self-evident. In other words, if it isn't property that can be taxed, it isn't property that can be attached.

Now, in some comparatively recent and what may be considered as leading cases maintaining that the situs is at the domicile of the debtor,

Bragg v. *Gaynor* (Wis.), 21 L. R. A. 161,
Newfelder v. *German Am. Ins. Co.* (Wash.), 22 L. R. A. 287,

the question of situs is very learnedly and exhaustively discussed; but the Court *assumes*, and its whole argument is based upon the *assumption, that the debt was property within the State at the domicile of the debtor*, over which the sovereign power of that State extended. This, of course, was the very thing to be proved, and the real and only question in the case.

Now, the cases and decisions on taxation show:

(*a*) That the right of taxation vested in the State is practically unlimited, save that it must be confined to subjects within the jurisdiction of the State.

In *McCulloch* v. *Maryland*, 4 Wheat. 428, 429, the Court say:

> "All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation."

In *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 319, the Court say:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. . . . Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, while the subjects to which it applies are within her jurisdiction."

In *St. Louis* v. *Wiggin's Ferry Co.*, 11 Wall. 423, 430, the Court say:

> "Where there is jurisdiction neither as to person or property, the imposition of a tax would be ultra vires and void. If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manne as the persons and property within its own limits and subjec

to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action."

In *Pullman Pal. Car Co.* v. *Penn.*, 141 U.S. 18, 22, the Court say:

"No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State."

(*b*) That the doctrine expressed in the maxim, "*Mobilia sequuntur personam*," is not allowed to stand in the way of the taxing power in the locality where the property has its actual situs and the requisite legislative jurisdiction exists.

In *St. Louis* v. *Wiggin's Ferry Co.*, *ubi supra*, the Court say:

"In the eye of the law personal property, for most purposes, has no locality. . . . In a qualified sense it accompanies the owner wherever he goes, and he may deal with it and dispose of it according to the law of his domicile. If he die intestate, that law, wherever the property may be situated, governs its disposition, and fixes the rights and shares of the several distributees. . . . But this doctrine is not allowed to stand in the way of the taxing power in the locality where the property has its actual situs, and the requisite legislative jurisdiction exists. Such property is, undoubtedly, liable to taxation there in all respects as if the proprietor were a resident of the same locality."

In *Pullman Pal. Car Co.* v. *Penn.*, *ubi supra*, the Court say:

"For the purposes of taxation, as has been repeatedly affirmed by this Court, personal property may be separated from its owner; and he may be taxed on its account at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the State which imposes the tax."

(*c*) That a mere debt or pecuniary obligation of a citizen of the State to a citizen and resident of another State has no "actual situs" and is not property at the domicile of the debtor over which legislative power of the debtor's State extends.

In *State Tax on Foreign-Held Bonds*, 15 Wall. 300, this precise point was decided. The case arose under a Pennsylvania statute, by which it was sought to tax in Pennsylvania debts due from a Pennsylvania corporation to non-residents of that State, such debts being evidenced by bonds of the corporation, and the payment of the debt or bond secured by mortgage upon property situated in that State. The Supreme Court of Pennsylvania held that the tax was valid. But, on writ of error, this judgment was reversed by Supreme Court of the United States, which held that in so far as the debts were due to non-residents of the State they were property beyond the jurisdiction of the State, and that the law in question was a law impairing the obligation of contract. FIELD, J., delivering the opinion of the Court, said:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and business. . . .
>
> "Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors, is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. *Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations in numerous adjudications, but no number of authorities and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement.*
>
> "The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State. The law which requires the treasurer of the company to retain five per cent. of the interest due to the non-resident bondholder is not, therefore, a legitimate exercise of the taxing power. . . .

"It is only one of many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property. It is, in fact, a forced contribution *levied upon property held in other States*, where it is subjected, or may be subjected, to taxation upon an estimate of its full value. . . .

"It is undoubtedly true that the actual situs of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the State in which it may be taxed. . . . But other personal property, consisting of bonds, mortgages and debts generally, has no situs independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidence of debt are not separated from the possession of the owners." (15 Wall. 319-20, 321, 323-4.)

The same question afterwards arose in Tennessee, in *So. Nashville St. R. Co.* v. *Morrow*, 87 Tenn. 406, 2 L. R. A. 853; and the language of the Tennessee Court (by LURTON, J., now of the United States Circuit Court of Appeals for the Sixth Circuit) was equally emphatic and pointed.

The Court said:

"The power of the State must then rest upon the proposition that these bonds are constructively within the jurisdiction of the State, although their owners have no residence here. When a non-resident is the owner of tangible property, real or personal, which has its actual situs here, there is no doubt but that the jurisdiction of the State over the property for the purposes of taxation is complete. This is true notwithstanding the fiction of the law that personal property has no situs but that of the owner. In such cases the fact that the actual situs of such personality is here, authorizes the taxation. . . .

"The bonds sought to be taxed are undoubtedly property, and personal property. They are, however, intangible property, and can have no actual situs. They are the mere evidence of debts by the company to the holder or owner thereof. The bond is evidence to support a demand for the payment of the money. Its destruction by accident would not discharge the debt. The debt would remain and might still be demanded and recovered. . . .

"The bond is property, but it is the property of the owner—the creditor, and not the debtor. . . .

"Bonds are undoubtedly subject to taxation. But when? by

what government? The answer cannot be doubtful. They can only be taxed by the government having jurisdiction of the owner. The situs of intangible personals, such as bonds, notes, accounts, etc., is necessarily the situs of the owner. . . .

"To sustain the jurisdiction of the State over these bonds for the purpose of taxation, we must ignore or contradict the legal fiction which ascribes to such property the situs of the owner. If the actual situs upon examination should prove to be here, then the legal fiction must yield. *But the actual situs is not here*; and to sustain the jurisdiction we must create a fictitious or constructive situs, based upon the notion that debts are in some way property in the hands of the debtor, or that, the security for the debt being here, therefore the debt is here. *By no sort of fiction can the jurisdiction of the State be held to extend to the property which a non-resident has in a debt which he holds against a resident. The creditor cannot be taxed, because he is not within the jurisdiction, and his property cannot be taxed, because it is not within the jurisdiction.*" (2 L. R. A. 861-2.)

(*d*) That it is property in the creditor's State over which the legislative power of that State extends.

In *Kirtland* v. *Hotchkiss*, 100 U.S. 491, this precise point was decided. After referring to cases above to the effect that, unless restrained by the provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction, HARLAN, J., delivering the opinion of the Court, said:

"Plainly, therefore, our duty is to inquire whether the Federal Constitution prohibits a State from taxing, in the hands of one of its resident citizens, a debt held by that citizen upon a resident of another State, such debt being evidenced by the bond of the debtor, and the payment of the debt or bond secured by deed of trust or mortgage upon real estate situated in the State in which the debtor resides.

"The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt which he holds against the resident of Illinois is property in his hands. 15 Wall. 320 (82 U.S., XXI., 187). It constitutes a portion of his wealth, and from that wealth he is under the highest obligation, in common with his fellow

citizens of the same State, to contribute for the support of the government whose protection he enjoys.

"The debt in question, although a species of intangible property, may, *for purposes of taxation, if not for all purposes*, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is, at best, only evidence of the debt, not the debt itself. . . .

"The debt, then, having its situs at the creditor's residence and constituting a portion of his estate there, both he and the debt are, for purposes of taxation, within the jurisdiction of the State. . . . Such taxation violates no provision of the Federal Constitution." (100 U.S. 498-9.)

In *Nevada Bank* v. *Sedgwick*, 104 U.S. 111, it was held that, under the second clause of Section 3408 of the Rev. Sts., the capital of a State bank, invested abroad and in foreign countries, could be taxed by the United States. WAITE, C.J., delivering the opinion, said:

"As long ago as 1819 it was said by this Court, speaking through Chief Justice Marshall, in *McCullough* v. *Maryland*, 4 Wheat. 429, that 'All subjects over which the sovereign power of a State extends, are subjects of taxation'; and, acting on this principle, we held recently, in *Kirtland* v. *Hotchkiss*, 100 U.S. 491, that a State might tax her resident citizens for debts held by them against non-residents and secured by mortgage on property in another State. That seems to us conclusive of this case. . . .

"In the absence of averments to the contrary, we must presume they (the investments) were such as banks usually make in doing a banking business, and that their legal situs was at the home office of the corporation. We need not consider, therefore, whether, if they had been made in fixed property subject exclusively to another jurisdiction, a different rule would apply." (104 U.S. 111-12.)

"The thing taxed is a debt, a species of intangible property, incapable of having an actual situs independent of its owner. . . . It might undoubtedly be taxed by the State when held by a resident thereof. The debt, then, having its situs at the creditor's residence, *both he and it are*, for the purpose of taxation, within the jurisdiction of the State."

Boyd v. *Selma* (Ala.), 11 So. p. 396.

(e)

GARNISHMENT OR ATTACHMENT.

Here, so far as respects mere debts due to citizens of another State, the decisions are hopelessly conflicting and the law in the utmost confusion,— a pretty good indication that in attachment, as well as in taxation and insolvency, the court and State at the domicile of the debtor have no rightful jurisdiction or dominion over the debt, or power to affect or discharge it, as against the non-resident creditor. But the courts of one State assert the power, which the courts of another State refuse to recognize; and even those courts that at all recognize the power when asserted by the courts of another State, cannot agree as to what extent it is to be recognized, or on what grounds, if any, it is to be supported. The result is, that in numerous cases the garnishee has been compelled to pay the same debt twice. As the Supreme Court of Illinois say:

> "It is of course true that every State must enforce its own laws within its own borders for the protection of its own citizens, but either the law, or the construction of it by the courts, in one or the other of the States is contrary to natural justice, which requires of a garnishee standing indifferent between creditors contending in different States for the same debt, the payment of that debt more than once."
>
> *Lancashire Ins. Co.* v. *Corbetts* (Ill.), 46 N.E. 631, 632.

And it is significant that most of the conflict and confusion has arisen within the last twenty years, or since the decision in *Pennoyer* v. *Neff*, 95 U.S. 714. In fact, the practice was taken from the custom of London, which grew up without statutory authority and without any other jurisdictional foundation than that might makes right; and the practice at first and for a long time was so generally adopted by statute in this country as to pass substantially without challenge. Prior to *Pennoyer* v. *Neff*, but little, if any, argument was attempted in its support further than some general assertion to the effect that such was the custom of London, or that by such garnishment "a chose in action was arrested," or that such garnishment "created a lien upon the debt, which the courts of other governments, *if they*

recognize such proceedings at all, cannot fail to regard." The prestige of some of the courts that were first called upon to construe the law in this country, those courts looking for the most part to the custom of London and decisions thereon for precedent, had great influence also on the uniformity of decisions. And the practice received a strong impetus from the tribal policy of each State to look out for its own first, which sometimes led State courts to overstep their rightful jurisdiction and power, especially in behalf of domestic creditors.

But of late, and especially since the decision in *Pennoyer* v. *Neff*, and the decisions on taxation and insolvency to which we have already referred, the subject has been a matter of frequent discussion both by courts and writers, but with the result as above stated. The time was never more ripe or opportune than now for a correct declaration of the law. In fact, the ultimate principles on which must rest such a decision as that for which we contend have already been fully established by this Court, the practice of some of the States and State courts to the contrary notwithstanding. And it has long been recognized by writers and the profession that the only hope of uniformity rests in the Federal Court.

32 Am. L. Rev. 54.
22 L. R. A. 287, n.

The question is constitutional as well as jurisdictional. This is clearly pointed out in —

Ogden v. *Saunders*, 12 Wheat. 213, 359.

. It is not a question between nations, or citizens of different nations, between whom there are no restrictions or limitations other than such as arise from the exercise of mere comity or from fear of international complications and war. If that were the question, the courts might be without power to limit or restrain any action of the legislature. As Mr. Justice BRADLEY said, in *United States* v. *Erie R. Co.*, 106 U.S. 330: "So far as the power of Congress is concerned, regarded in reference to any power the courts have to limit or restrain it, I see no reason why Congress may not lay a tax upon any property upon which the government can lay its hands, whether

within or without the jurisdiction of the United States. . . . It might create great complications with foreign governments, it is true, and involve the country in war; but Congress has the power, if it chooses to take the responsibility, of creating or giving occasion to such complications. The responsibility rests upon it alone. So if, in taxing money due from citizens of the United States to foreign citizens, any complications arise with the governments to which the latter are subject, Congress alone has the responsibility, and is the only department of our government which has a right to take such a responsibility."

But the question in the case at bar is one between the several States of the union or citizens of different States; and, as pointed out in numerous decisions of this Court, the powers of the several States as against citizens of other States are, and always have been, very much limited and restricted by certain provisions of the Federal Constitution, and are becoming more and more limited and restricted as the operation and effect of those provisions become better appreciated and understood. In view of these limitations and restrictions on the powers of the several States, it is at once obvious that the custom of London and decisions thereon, as well as such cases as the following, which, so far as relevant, have to do with international rights where there are no such limitations and restrictions, are to be eliminated from our consideration:

Harrison v. *Sterry*, 5 Cranch, 289 (1809).
Blake v. *Williams*, 6 Pick. 286 (1828).
Very v. *McHenry*, 29 Me. 206, 214-15 (1848).
May v. *Breed*, 7 Cush. 15 (1851).
Peck v. *Hibbard*, 26 Vt. 698, 704 (1854).
Long v. *Hammond*, 40 Me. 204 (1855).
Pattison v. *Wilbur*, 10 R.I. 448 (1873).
United States v. *Erie R. Co.*, 106 U.S. 327, 330 (1882).
Hilton v Guyot 159 U. S. 113 (1894)

The question is also jurisdictional as well as constitutional. And since the decision in *Pennoyer* v. *Neff*, it has come to be well understood that, to give validity to such proceedings *quasi in rem*, property of the non-resident must be found within the State and brought within the jurisdiction of the court at the commencement of the proceedings.

Reno, Non-Res., sec. 218 *et seq.*, 286.

In respect of lands and chattels, the whole matter is plain and the law well settled; for these are subject to the jurisdiction and laws of the State where located and kept, even though the owner is a non-resident; and the State has power to divest the owner's title to such property by operation of law under its attachment and execution laws, just as under its limitation, insolvency and taxation laws. And the title thus acquired is valid, and must be respected, under the clause of the Constitution requiring full faith and credit to be given.

Green v. *Van Buskirk*, 7 Wall. 139.
Reno, Non-Res., secs. 25, 174, 215, 505.

But how in respect of debts? It was early declared that "all debts follow the person, not of the debtor *in respect of the right of property*, but of the creditor to whom due."

Ld. HARDWICKE, *Thorne* v. *Watkins*, 2 Ves. Sr. 35 (1750).

It is obvious that the thing which is taxed or attached is not the "debt," but rather the opposite and correlative of "debt," namely, the "credit," that is, the creditor's property in the debt. The Massachusetts Statute states it correctly: "Goods, effects and *credits*." (Mass. Pub. Sts. c. 183, sec. 21.) The debt is not property but rather the absence of property. As this Court said, in *Murray* v. *Charleston*, 96 U.S. 432: "Debts are not property. The non-resident cannot be said to be, in virtue of a debt due to him, a holder of property within the city." (96 U.S. 440.)

And it has been settled by this Court that for the purpose of taxation, if not for all purposes, the situs of a debt (that is, the creditor's property therein) is at the domicile of the creditor and not at the domicile of the debtor; and that when held by the non-resident the debt has a situs, is property, and can be taxed in the creditor's State; but has no situs, is not property, and cannot be taxed in the debtor's State.

That is decisive of the case at bar, unless it can be established, either (1) that the situs of the debt (that is, the creditor's property therein) for attachment is different from its situs for taxation, or

(2) that jurisdiction in garnishment by foreign attachment does not depend upon the situs of the debt, or the *res*, being within the territorial jurisdiction of the court. Some courts have attempted to sustain such so-called attachments upon one of these grounds, and some upon the other. We propose now to show that the

Situs of debt for attachment is same as its situs for taxation,

that the debt in question was not property in Rhode Island, that the transaction out of which the indebtedness arose was not even business in Rhode Island, that jurisdiction in garnishment in foreign attachment is dependent upon the *res* being within the territorial jurisdiction of the court, and that such so-called attachment proceedings at the domicile of the debtor without personal jurisdiction of the non-resident creditor are without jurisdiction of the person or the *res* and not entitled to full faith and credit in the courts of another State:

(*a*) *No separate situs can be assumed.*

The first reason or argument usually urged in support of such a difference or distinction is this: "Because such (attachment) laws necessarily assume that the property has a situs distinct from the owner's domicile."

> *Harvey* v. *Gt. Northern R. Co.* (Minn.), 17 L. R. A. 84, 88-9.
>
> *Wyeth Hardware & Mfg. Co.* v. *Lang* (Mo.), 27 L. R. A. 651, 653.

But, as we have already shown (*supra*, p. 21), the same is also true of taxation laws, especially laws taxing property belonging to non-residents. But the decision of this Court on taxation laws passed on that same assumption was that the debt could have no situs at the domicile of the debtor and was not property there. As stated by Mr. Justice FIELD, in *State Tax on Foreign-Held Bonds*, debts "can have no locality separate from the parties to whom they are due." (15 Wall. 320.) And as stated by LURTON, J.:

> "By no sort of fiction can the jurisdiction of the State be held to extend to property which a non-resident has in a debt which he holds against a resident. The creditor cannot be taxed, because he is not within the jurisdiction, and his property cannot

be taxed, because it is not within the jurisdiction." (See *ante* pp. 23-4.)

The making of the contract was not even business in Rhode Island.

The making of the contract out of which the indebtedness arose was not even business in Rhode Island, and in such transaction Brown, Steese & Clarke never in any way subjected themselves or their property in the debt to the regulation or control of Rhode Island; for the wool was sold and delivered in Massachusetts, and the purchase price for the same was there payable when due.

Allgeyer v. *Louisiana*, 165 U.S. 578.
Holder v. *Aultman*, 169 U.S. 81.
Caesar v. *Capell*, 83 F.R. 403, 410-11.
Sullivan v. *Sheehan*, 87 F.R. 247.
Eastern Bldg. & Loan Ass'n v. *Bedford*, 88 F.R. 7, 12.
Neal v. *New South Bldg. & Loan Ass'n*, (Tenn.) 46 S. W. 755.
Norton v. *Union Bank & Tr. Co.* (Tenn.), 46 S. W. 544.

Further, it was never conceded by this Court or this country, if indeed by any other, that one nation or State could discharge a contract, not made or to be performed within the State, when held by a non-resident. The contrary was always uniformly held.

McMillan v. *McNeill*, 4 Wheat. 209.
Ogden v. *Saunders*, 12 Wheat. 255, 293, 315, 331, 333, 368.
STORY, Circuit Justice, *Van Reimsdyk* v. *Kane*, Fed. Cas. No. 16,871; s.c., 9 Cranch, 153.
WASHINGTON, Circuit Justice, *Green* v. *Sarmiento*, Fed. Cas. No. 5,760.
Kelly v. *Drury*, 9 Allen, p. 28.
STORY, Confl. of Laws, (7th ed.) sec. 342 and cases.
DICEY, Confl. of Laws, (Am. Notes by J. B. Moore), pp. 449 *et seq.*, Rules 112, 113, and cases.

It was only when the contract was made or to be performed within the State, as in *Ogden* v. *Saunders*, that any real conflict or contest arose as to the want of power and jurisdiction of the State to discharge the contract as against the non-resident. And in *Ogden* v. *Saunders*, and subsequent cases, the conclusion was that the State

had no power or jurisdiction to discharge the contract, even though made and to be performed within the State.

Ogden v. *Saunders*, 12 Wheat. 213.
Baldwin v. *Hale*, 1 Wall. 223.
Gilman v. *Lockwood*, 4 Wall. 409.

Nevertheless certain courts have attempted to preserve in garnishment that distinction between contracts made or to be performed within the State and those made or to be performed elsewhere, holding the former subject to garnishment and the latter not.

See *McBee* v. *Purcell N. Bk.* (Ind. Ter. App.), 37 S.W. 55.
Smith & Co. v. *Taber* (Tex. Civ. App.), 40 S. W. 156.
Walker v. *Fairbanks*, 55 Mo. App. 478.
Hamilton v. *Plumer* (Mich.), 34 N.W. 278.
Am. Cent. Ins. Co. v. *Hettler* (Neb.), 56 N.W. 711.

But we believe that here also, as in insolvency, the same principle and rule will have to be applied to both classes of contracts, viz., that the court without personal jurisdiction of the non-resident creditor has no power or jurisdiction to discharge the contract, whether made or to be performed within or without the State. And the power or jurisdiction of the State or court to make effectual an attachment of a debt due to a citizen of another State, depends wholly upon its power to discharge such debt as against the non-resident, or to authorize performance otherwise than as the obligation of the contract requires. If it has no such power to discharge the debt, or impair the obligation of contract, the garnishment is without force or effect.

(*b*) *That creditor could have sued debtor at latter's domicile does not make it property there for attachment any more than it did for taxation.*

The second reason or argument usually assigned is, as stated by the Supreme Court of Rhode Island, that "as defendants could have maintained an action against the garnishee in this State for the recovery of the debt in question, then said debt was within this State, and subject to an attachment here." (Record, p. 133 and cases there cited.)

As a matter of fact the assumption that the defendants could have maintained an action in Rhode Island against the garnishee at the time of the garnishment is contrary to the fact; for having submitted themselves and their property to the jurisdiction of the Massachusetts Court of Insolvency, they could not have maintained an action in Rhode Island in their own behalf and would have been enjoined had they attempted it. And there was still another reason why they could not have maintained an action in Rhode Island, namely, that no right of action had accrued in Massachusetts even, where the debt was payable when due; *a fortiori*, had no right of action accrued in Rhode Island. There was a special limitation in respect of the time and place of payment. None of it was payable until on or after September 12, 1889, and it was then payable in Boston. It could not, therefore, be said to be payable or demandable elsewhere, at least not until after there had been a default or failure to pay at the time and place when and where payable. No such default had occurred. The debt was therefore not suable or demandable in Rhode Island, and on this ground alone was clearly not attachable.

But this argument that a debt is attachable wherever suable is the one most generally advanced and relied upon. The fallacy of the argument is this: The mere fact that defendants had a right to go into Rhode Island themselves and sue there on their claim and so subject it to the laws and jurisdiction of the courts of Rhode Island, would not make it property in Rhode Island. A party can send his personal property into another State and so subject it to attachment in that State; but it is obvious that until he does no one can attach it there. Surely no one could attach it in that State merely because the owner had a right to send it there. So in the case of a debt, undoubtedly the creditor has a right to take proceedings in the debtor's State; and if he does so, he subjects his claim to the jurisdiction of the laws and courts of that State. As we pointed out under limitation laws, the statutes of limitations of one State can have no effect on a debt due from a citizen of that State to a citizen of another State; but the creditor may bring action in the debtor's State, and if he does he subjects his claim to the limitation laws and becomes bound by the bar of the statute. But the mere fact that he has the right to

subject his claim to those laws does not authorize creditors of his to do so. So, again, one State cannot, by its insolvency laws and proceedings thereunder, discharge a debt due to a creditor who is a citizen of another State; but that creditor may appear in the insolvency proceedings, and if he does he subjects his claim to the insolvency laws and proceedings and so becomes bound by the discharge. But the mere fact that he has this right, does not give creditors of his the right to do so. There is no difference in this respect between debts and other personal property. Until the owner has brought his property within the dominion of the laws of the State, it is not attachable there.

The Supreme Court of Minnesota, in a recent case, have well said:

> "It is true that this defendant might have brought an action in this State against this insurance company to recover for this loss, and have obtained service by serving the summons on the insurance commissioner. But this does not prove that this debt has always had a situs in this State. In the first place, that action would be in personam, not in rem; and, for the purpose of such an action, it is immaterial where the situs of the debt is. In the next place, the creditor may, by his voluntary act, give the debt a situs also at some place other than that of his domicile. *He may, so to speak, take the debt with him for the purpose of bringing suit upon it. But a third person claiming to be a creditor of such creditor cannot do this.* Such a stranger has no power to change the situs of the debt, or give it a situs at a place where it would not otherwise have it. In our opinion, the debt in question had no situs in this State, and the Court below had no jurisdiction."
>
> *Swedish-Am. Natl. Bank* v. *Bleecker* (Minn.), 75 N.W. 740, 742.

In *Cent. Tr. Co.* v. *Chattanooga, R. & C. R. Co.*, 68 F.R. 685, CLARK, District Judge, refused to follow the decisions of the Supreme Court of Tennessee, and, on the point now under consideration, said:

> "In *Railroad Co.* v. *Barnhill*, importance is apparently attached to the fact that the principal debtor might have come to Tennessee and sued the company for his wages in the courts of Tennessee. But the action on that debt is transitory, and suit may be maintained in any jurisdiction where process can be served on the debtor. This is a question quite apart from the situs of the debt, where seizure of property takes the place of

the regular process as basis of jurisdiction. In cases like this the question is not where the party may sue, but where the defendant's property is for the purpose of levy in the absence of personal process served." (68 F.R. 693.)

(c) *Attachment laws cannot "fix" the situs of the debt at the domicile of the debtor any more than can taxation laws.*

It has been suggested that the legislature might, for the purpose of attachment, "fix" the situs of the debt at the domicile of the debtor.

Williams v. *Ingersoll*, 89 N.Y. 509, 523-4, EARL, J.
Douglas v. *Phoenix Ins. Co.* (N.Y.), 20 L. R. A. 118, 121-2, ANDREWS, C.J.
Swedish-Am. Natl. Bank v. *Bleecker* (Minn.), 75 N.W. 740, 741.

In *William* v. *Ingersoll*, which is always cited as authority for the suggestion, the Court in explanation say:

"The law seems to be thus settled for the reason that it would be unjust to compel the debtor to pay his debt twice." (89 N.Y. 524.)

That is, the attachment laws of the State cannot really change the actual situs or make that property within its borders which is not property there; but if the laws of one State authorize such an alleged attachment on the assumption that it is property within the State, the courts of other States will probably recognize such proceedings rather than compel the debtor to pay his debt twice.

The decision in the above cases afford about the best answer to the suggestion; for in each of the cases the statement was not only a mere dictum, but the Court expressly refused to recognize such a situs thus fixed by the attachment laws of Connecticut in the first case, the attachment laws of Massachusetts in the second, and by the attachment laws of its own State in behalf of one of its own citizens in the third. And in the first two cases the Court refused to recognize such so-called attachment proceedings in courts having jurisdiction of the debtor, even though the debtor should be compelled to pay twice.

In *Douglas* v. *Phoenix Ins. Co.*, ANDREWS, C.J., said:

"No State can subject either real or personal property out of the jurisdiction to its laws. . . . It is a fundamental rule that in attachment proceedings the *res* must be within the jurisdiction of the Court issuing the process, in order to confer jurisdiction. In the case of movables, their seizure under the attachment shows that their actual situs is within the jurisdiction. But in respect of intangible interests, debts, choses in action, bonds, notes, accounts, interests in corporate stocks and things of a similar nature, the question whether the *res* is within the jurisdiction of the sovereignty where the process is issued is not so readily determined. The general rule is well settled that the situs of debts and obligations is at the domicile of the creditor. But the attachment laws of our own and of other States recognize the right of a creditor of a non-resident to attach a debt owing or due to him by a person within the jurisdiction where the attachment issues, and to this extent the principle has been sanctioned that the laws of a State for the purpose of attachment proceedings may fix the situs of a debt at the domicile of the debtor." (33 N.E. 940.)

Nevertheless, as already stated, the Court refused to recognize the situs fixed by the attachment laws of Massachusetts.

The above cases concede, nay even hold, that the real situs of the debt is at the domicile of the creditor. Now, of late, certain courts of the highest respectability, seeing that the situs is at the domicile of the creditor and that it is not at the domicile of the debtor and cannot be fixed there, in order to sustain garnishment by foreign attachment have taken the position that jurisdiction in such cases does not depend upon situs nor upon the *res* being within the jurisdiction of the Court. We notice this position and the cases in support of it under (*d*) *infra*. While we cannot accede to that position, their criticism of the suggestion under consideration is absolutely unanswerable.

Thus, in *Natl. F. Ins. Co.* v. *Chambers* (N.J. Eq.), 32 Atl. 663, PITNEY, V.C., after reciting the passage above quoted, says:

"Now, here I venture to suggest that the learned judge here concedes the whole question, because, as I have above observed, if the situs of the debt is at the domicile of the creditor, then it never can come under the jurisdiction of a foreign attachment against him, because he is always, in such cases, out of the jurisdiction of the court issuing the attachment.

"To admit that jurisdiction may be exercised over a debt due to a non-resident is either to admit that the presence of the *res* within the jurisdiction is not necessary, or else to assert — as, in fact, the chief judge does assert — that a State may arbitrarily change the actual situs of a chose in action not within its jurisdiction, and declare it to be within the jurisdiction, contrary to the fact. There is no escape from this dilemma." (32 Atl. 672-3.)

And in *Mooney* v. *Buford, etc., Mfg. Co.* (C. C. A. 7th), 72 F.R. 32, the Circuit Court of Appeals for the Seventh Circuit criticize the suggestion even more sharply and decisively, as follows:

"The decisions cited to sustain it proceed upon the assumption — which we think clearly erroneous — that jurisdiction in garnishment against a debtor of the principal defendant, who cannot be personally served with process, depends, when tangible property has not been attached, upon the situs of the debt. The assumption makes garnishment impossible in cases of foreign attachment, whether the debtor sought to be reached is a resident or a non-resident. Escape is sought from this result by saying, as in *Douglas* v. *Ins. Co., supra*, 'that the laws of a State, for the purposes of attachment proceedings, may fix the situs of a debt at the domicile of the debtor.' That is a sheer fiction which, if resorted to at all, may just as well be enlarged so as to include foreign corporations whenever they are doing business under agreement that process may be served upon their agents as if upon themselves. But, manifestly, the essentials of jurisdiction cannot rest upon a fiction, and if, in this class of cases, the situs of a debt or chose in action is essential, it must be the real situs. It is not in the power of the legislature of a State to affect the rights of non-residents, against their consent, by declaring that, of two things which are not identical, one shall be deemed to be the equivalent of the other,— certainly not by declaring that something out of the State shall be deemed to be within it." (72 F.R. 38.)

In *Cent. Tr. Co.* v. *Chattanooga, R. & C. R. Co.*, 68 F.R. 685, CLARK, District Judge, in a very careful and well reasoned opinion, holding that the situs of the debt even for the purpose of attachment proceedings was at the domicile of the creditor and not at the domicile of the debtor, on this point said:

"It is to be remembered that this question of jurisdiction, and for that purpose the situs of the res, is vital and fundamental.

> And, where a strictly jurisdictional fact is wanting, it cannot be supplied by mere assertion or assumption. The fact must legally and rightfully exist. Or, as the Court declared in *Everett* v. *Walker* (Colo. App.), 36 Pac. 616, in an able discussion of this question: 'It is as impossible by judicial construction as by legislative enactment to declare that property out of the State, having a domicile with the creditor or the debtor, is within the limits of the sovereignty for the purpose of a levy.' (68 F.R. 691.)"

The Supreme Court of Alabama has wholly repudiated such so-called attachments in the most sensible, if not the best reasoned, opinion to be found in all the cases. Among other things, the Court considered and conclusively answered the above suggestion; for as that Court points out, if the debt has not already a situs within the State, the legislature cannot give it one; if it has a situs, then it needs no "fixing." The Court say:

> "If it be conceded that a debt due by a resident of or a corporation doing business in one State to a resident in another State is not properly within the State of the debtor's residence, no legislation by the latter State can give it a situs there. . . . If it has no situs within the debtor's State, in the absence of legislation, any legislation attempting to give it such situs, or to prescribe the manner of service on either the debtor or the non-resident, by which jurisdiction over it may be acquired, unless by personal service on the creditor within the State or his voluntary appearance, would be as nugatory and ineffectual to dispose of the creditor's property in the debt as would be legislation attempting to acquire jurisdiction over tangible property situated without the State. The subject matter of such legislation, namely, the property over which it is attempted to acquire jurisdiction, is entirely beyond the power and control of the State. In the view we take of the question, the condemnation of a debt due to a non-resident, without personal service within the State of the suit on the debtor or owner of the debt, or his voluntary appearance, is without due process of law, and it seems manifest that a State cannot make that due process of law which is not such."
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> *Louisville & N. R. Co.* v. *Nash* (Ala.), 41 L. R. A. 331-2.

As pointed out by the Supreme Court of Ohio, the legislature may fix the situs of a debt as between citizens of the State but not as against citizens of another State. The Court say:

"It is claimed, however, that without physical seizure of the property in Lucas county, the marshal had no jurisdiction to order the payment of the amount due from the garnishee into Court, as no personal service was obtained upon the defendants in the action. A number of cases are cited in support of this proposition. But they are all cases where the defendant was a non-resident of the State in which action was commenced.

"It may be conceded that the credits of a non-resident debtor, without personal service upon him, cannot be attached in this State by simply serving the process of garnishment upon his debtor residing within the jurisdiction of the Court issuing the process. That would be to give the laws an extra territorial effect.

"In *Railroad Co.* v. *May*, 25 Oh. St. 347, it was held that the indebtedness of the company to a person residing in this State could be attached in the courts of a sister State without personal service, but this seems opposed to the recent decision of the Supreme Court of the United States, in *Cole* v. *Cunningham*, 133 U.S. 107; Reno, Non-Res., Sec. 140. A number of State courts take the same view. Id. Sec. 216. But as between citizens of the State, subject to its laws, the case is wholly different."

Root v. *Davis* (Ohio), 36 N.E. 670.

This was fair warning to the courts of other States that the Supreme Court of Ohio would no longer recognize such so-called attachments and discharges of debts due to citizens of that State.

The Supreme Court of Illinois considered a suggestion similar to that under consideration and answered as follows:

"The still further contention of counsel for appellants that our statute changes the common law rule whereby personal estate follows the person of the owner, and is distributed pursuant to the law of his domicile at the time of his death, is sufficiently answered by the fact that the statute has, by its own terms, reference only to 'property in this State,' sec. 1, ch. 39, Rev. Stats. 1874. And since the only property right which there can be in a debt is a mere right to receive payment of it, it is impossible that there can be anything of a tangible nature connected with such right which can occupy locality; and so the property right must accompany and remain with the person of the owner of the debt, and therefore it cannot be in this State when the domicile of the owner is in another State."

Cooper v. *Beers* (Ill.), 33 N.E. 61, 62.

See also *Consol. Tank Line Co.* v. *Collier* (Ill.), 35 N.E. 756, 757.
Holbrook v. *Ford* (Ill.), 27 L. R. A. 328.

Certain of the States, in the time of the Revolution, attempted to fix the situs of debts at the domicile of the debtors by their confiscation laws, requiring the debtor to pay the same to the State; but, at the conclusion of peace, England insisted (as she is very apt to do) that all debts due to her citizens should be paid, and the debtor found that what he had paid was simply his own money and that the debt, the obligation, still remained and must be satisfied.

Ware v. *Hylton*, 3 Dall. 199.

Taxation laws attempted to "fix" the situs of the debt at the domicile of the debtor as against the non-resident creditor. But this Court held all such laws nugatory and ineffectual.

It is absurd to argue that the State can fix the situs of the debt at the domicile of the debtor for the benefit of one of its creditors, but cannot fix it there so as to make it contribute to its own support. For the power of taxation is an incident of sovereignty and co-extensive with it.

MARSHALL, C.J., *McCulloch* v. *Md.*, 4 Wheat. 316, 429.
Cooley on Tax. (2d ed.), pp. 4, 5.

The Rhode Island statute in question makes no attempt to fix the situs of such a debt. It simply authorizes the attachment of "the personal estate of the defendant in the hands" of the garnishee, "his personal estate in the hands," etc. (The Gen. Laws, ch. 254, sec. 10; ch. 252, sec. 17).

Nor did the Court place its decision upon that ground, but rather upon the ground that the *res* was in fact in the State of Rhode Island and within the jurisdiction of the Court. (Record, pp. 132, 135.)

(*d*) *Jurisdiction in garnishment by foreign attachment does depend upon the res being within the territorial jurisdiction of the Court.*

Jurisdiction of the garnishee does not give jurisdiction of the creditor's property in the debt in attachment proceedings any more than it did in taxation or insolvency proceedings.

Again, it has been argued that, the situs of the debt being at the domicile of the creditor and so beyond the territorial jurisdiction of the court, the jurisdiction of the court in garnishment by foreign attachment does not depend upon the situs of the debt being at the domicile of the debtor, or upon the *res* being within the territorial jurisdiction of the court, but solely upon the liability of the garnishee to suit at the place of garnishment; that is, that service on and jurisdiction of the garnishee, without personal jurisdiction of the creditor, and irrespective of the situs of the debt, gives the court jurisdiction over the debt which the garnishee owes the non-resident creditor.

National Fire Ins. Co. v. *Chambers*, 53 N.J. Eq. 468, 32 Atl. 663.
Lancashire Ins. Co. v. *Corbetts*, 165 Ill. 592, 46 N.E. 631.
Mooney v. *Buford Mfg. Co.* (C. C. A. 7th), 72 F.R. 32.
Howland v. *Chicago, etc., R. Co.*, 134 Mo. 474, 36 S. W. 29.
See also *Mason* v. *Beebee*, 44 F.R. 556, 559, SHIRAS, District Judge.
Deming v. *Orient Ins. Co.*, 78 F.R. 1, 3-4, SHIRAS, District Judge.
Reimers v. *Seatco Mfg. Co.* (C. C. A. 6th), 70 F.R. 573, 574.
Singer Mfg. Co. v. *Fleming* (Neb.), 23 L. R. A. 210, 213.

Until quite recently the courts of this country have with great unanimity attempted to sustain jurisdiction in foreign attachment upon the ground that the situs of the debt was, for the purpose of attachment, at the domicile of the debtor. But in the recent New Jersey case, *supra*, PITNEY, V.C., in a long and exhaustive opinion, showed the utter falacy of such reasoning, and maintained his position with such vigor and force that his decision has well-nigh produced a complete revolution in the decisions, and has already been followed by a number of other courts in decided cases.

After citing cases and authorities to the effect that the situs of the debt is at the domicile of the creditor (32 Atl. 668-9), he adds, "And this seems to be necessarily so upon principle." (32 Atl. 669.) "Indeed," he says, "the burden of the argument of Mr. Crandall was that the debt due from the complainant to Chambers had its situs in New Jersey, and therefore was not within the jurisdiction of the Pennsylvania Court. But the difficulty with this argument is that it goes too far, and would defeat all foreign attachments so far as relates to reaching debts due to the defendant in attachment, because they would all be held to have their situs with the non-resident defendant out of the State, and so beyond the jurisdiction of the State." (32 Atl. 669.)

He then takes the position that, while the *res* must be within the territorial jurisdiction of the Court in order to give the Court jurisdiction of a foreign attachment of tangible chattels capable of actual seizure, it is not necessary that the *res* should be within the territorial jurisdiction of the Court in order to give the Court jurisdiction of a foreign attachment of choses in action. (32 Atl. 663, 2d. par. of syllabus.)

> "It follows," he says, "that the real and only liability of a party as garnishee is by reason of his owing a debt to the defendant in the suit, and the garnishment consists in nothing more than a 'warning' to him not to pay the debt to his creditor until the plaintiff's debt is satisfied. In the process of garnishment, as thus understood, the fact that the debt subject to be garnished has its situs out of the jurisdiction has never been held to stand in the way of the process of the Court. I come, therefore, to the conclusion that the real and only ground of jurisdiction in the case of attachment of choses in action is the service, within the jurisdiction, of the warning upon the debtor (garnishee); and, when that is done, jurisdiction is obtained." (32 Atl. 669.) (See also his criticism of *Douglas* v. *Ins. Co.*, *ante*, pp. 36, 37.)

He then points out that as early as the time of Lord Holt, two hundred years ago, the garnishee was charged, although the Court

then recognized that the situs of the debt was at the domicile of the creditor and so beyond the territorial jurisdiction of the court. (32 Atl. 669-70.)

The result of that decision is perhaps best stated by the Supreme Court of Illinois, as follows:

> "To hold that the situs of the debt determines the question of jurisdiction is practically to hold that a debt cannot be garnished at all in foreign attachment, for the only ground of a foreign attachment is the non-residence of the principle defendant, who, in the case of garnishment, is the creditor of the garnishee; and if the debt which the garnishee owes to his creditor can be reached only by proceedings had where such creditor resides (that is, where the debt has its situs), it cannot be reached in foreign attachment at all. This is clearly pointed out in an exhaustive opinion by PITNEY, V.C., in *Ins. Co.* v. *Chambers*, 53 N.J. Eq. 468, 32 Atl. 663, where he shows the utter fallacy of the reasoning used to support decisions that jurisdiction in such cases depends on the situs of the debt attached or garnished."
>
> *Lancashire Ins. Co.* v. *Corbetts* (Ill.), 46 N.E. 631, 632.

In other words, these authorities establish the point for which we contend, that garnishment of a debt due to a non-resident is not a proceeding *quasi* in *rem* at all; that in such cases the *res* is at the domicile of the creditor, outside the State, and so beyond the territorial jurisdiction of the Court. Such proceedings, therefore, are clearly open to the objections sustained in *Pennoyer* v. *Neff*, in *McMillan* v. *McNeill*, *Ogden* v. *Saunders* and *Baldwin* v. *Hale*, and in *State Tax on Foreign-Held Bonds*.

If garnishment could be sustained on the ground pointed out in these decisions, it would follow that all foreign corporations doing business within the State or subject to service of process there could be held as garnishee, even though the liability was to a citizen of another State on a contract made and to be performed in such other State. The decisions in the above cases were rendered in or with reference to just such a case, the garnishees being foreign corporations and the place of garnishment being neither the domicile of the

debtor nor that of the creditor. To the effect that foreign corporations are chargeable, see—

Ill.	*Lancashire Ins. Co.* v. *Corbetts*, 165 Ill. 592, 46 N.E. 631, 36 L. R. A. 640.
Ia.	*Mooney* v. *Union Pac. R. Co.*, 60 Ia. 346, 14 N.W. 343.
Me.	*Cousens* v. *Lovejoy*, 81 Me. 467, 17 Atl. 495.
	Cf., *Lovejoy* v. *Albee*, 31 Me. 414.
Mass.	*Natl. Bank of Commerce* v. *Huntington*, 129 Mass. 444.
Mo.	*Howland* v. *Chicago, etc., R. Co.*, 134 Mo. 474, 36 S.W. 29.
N.J.	*Natl. F. Ins. Co.* v. *Chambers*, 53 N.J. Eq. 468, 32 Atl. 663.
Pa.	*Barr* v. *King*, 96 Pa. 485.
R.I.	*Moshassuck Felt Mill* v. *Blanding*, 17 R.I. 297, 21 Atl. 538.
Tenn.	*Ry. Co.* v. *Barnhill*, 91 Tenn. 395, 19 S.W. 21.
Wash.	*Neufelder* v. *German-Am. Ins. Co.*, 22 L. R. A. 287.
Fed.	*Mooney* v. *Buford, etc., Mfg. Co.* (C. C. A. 7th), 72 F.R. 32.

But there are a large number of decisions holding that foreign corporations are not so chargeable.

Ala.	*Louisville & N. R. Co.* v. *Nash*, 23 So. 825, 41 L. R. A. 331.
Colo.	*Everett* v. *Walker*, 4 Colo. App. 509, 36 Pac. 616.
Del.	*Natl. Bank* v. *Furtick*, 42 Atl. 479.
Ga.	*Wells* v. *East Tenn. V. & G. R.*, 74 Ga. 548.
Kans.	*Railway Co.* v. *Sharitt*, 43 Kans. 375.
Md.	*Myer* v. *Ins. Co.*, 40 Md. 595.
Mich.	*Milwaukee B. & I. Works* v. *Brevoort*, 73 Mich. 155, 41 N.W. 215.
Minn.	*Swedish Am. Natl. Bk.* v. *Bleecker*, 75 N.W. 740, 42 L. R. A. 283.
	Cf., *Harvey* v. *Gt. N. R. Co.*, 50 Minn. 405, 52 N.W. 905, 17 L. R. A. 84.
Miss.	*Ill. Cent. R. Co.* v. *Smith*, 70 Miss. 344, 19 L. R. A. 577.
Mont.	*Brisco* v. *Minah Consol. Min Co.*, 82 F.R. 952.
Neb.	*Am. Cent. Ins. Co.* v. *Hettler*, 37 Neb. 849, 56 N.W. 711.
	Balk v. *Harris*, 32 S.E. 799.
N.C.	*Cf.*, *Boyd* v. *Ins. Co.*, 111 N.C. 372, 16 S.E. 389.
N.H.	*Smith* v. *B. C. & M. R. Co.*, 33 N.H. 337.
N.Y.	*Douglas* v. *Phoenix Ins. Co.*, 138 N.Y. 209, 33 N.E. 938, 20 L. R. A. 118.
Tex.	*Caledonia Ins. Co.* v. *Wenar*, 34 S.W. 385.
Vt.	*Craig* v. *Gunn*, 67 Vt. 92, 30 Atl. 860.

Wis. *Morawetz* v. *Sun Ins. Office*, 96 Wis. 175, 71 N.W. 109.
Fed. *Reimers* v. *Seatco Mfg Co.* (C. C. A. 6th), 70 F.R. 573.
Cent. Tr. Co. v. *Chattanooga, R. & C. R. Co.*, 68 F.R. 685.

And if these decisions can be upheld it must be on the broad general ground for which we contend. They cannot rest on the fact that the garnishee was a non-resident or foreign corporation. There may be the same distinction that there was between *Ogden* v. *Saunders* and *McMillan* v. *McNeill*, but nothing more.

The Supreme Court of Massachusetts at an early day attempted to make jurisdiction turn on the question of the residence or non-residence of the garnishee. Thus, it laid down the law as fundamental and jurisdictional that a non-resident, although found and served within the jurisdiction, could not be held as trustee unless he had actual property of the defendant in his possession within the State, or owed him a debt there payable. (10 Mass. 343; 3 Pick. 302; 15 Pick. 445; 21 Pick. 263.) And held the same principle applicable to foreign corporations. (3 Met. 564; 1 Gray, 424; 14 Allen, 342; 106 Mass. 120.) And the courts of other States following the Massachusetts decisions laid down the same law in numerous decisions. And so the law stood for a long time. But the Legislature of Massachusetts passed a statute making non-residents and foreign corporations, having a place of business or subject to service of process within the State, liable to trustee process, the same as citizens and domestic corporations. (St. 1870, ch. 194; P.S. ch. 183, sec. 1.) And this statute, broad and unqualified as it was, the Court was compelled to uphold. (*Natl. Bank of Commerce* v. *Huntington*, 129 Mass. 444.) The New York Court of Appeals, however, rightly held that the Massachusetts courts could acquire no jurisdiction, by virtue of that statute, over the liability of a foreign corporation to a citizen of New York on a policy of insurance issued in New York on property in New York. (*Douglas* v. *Phoenix Ins. Co.*, 138 N.Y. 209, 33 N.E. 938, 20 L. R. A. 118. See also *Lovejoy* v. *Albee*, 31 Me. 414.)

It should be noticed, further, that even if garnishment could be sustained, on this ground, as against the non-resident creditor him-

self, it could not be so sustained as against insolvency proceedings at the domicile of the creditor; for these decisions expressly concede that the situs of the debt, that is, the creditor's property in the debt, is at the domicile of the creditor. And if so, it would be subject to the jurisdiction and control of the court at the domicile of the creditor and pass under the assignment in insolvency, and the courts of other States could not refuse to give full faith and credit to that assignment. That is exactly our case. For in the case at bar the question is not simply whether garnishment can be sustained in such a case as against the non-resident himself, but it is an interstate question of property rights. The conflict is between Massachusetts insolvency laws and proceedings on the one hand, and the Rhode Island attachment laws and proceedings on the other; which were entitled to full faith and credit and to prevail as against the other depended upon the situs of the property and upon that alone. If Rhode Island was entitled to assert a preference in behalf of one of her citizens in case the property was in Rhode Island, Massachusetts was entitled to assert a preference and priority in its own behalf in case the property was in Massachusetts. The concession, therefore, that the property is at the domicile of the creditor makes these decisions authorities for the plaintiffs in error and decisive of the case at bar.

And we submit, further, that garnishment cannot be sustained on the ground suggested in these decisions, even as against the non-resident creditor himself.

Garnishment as against a non-resident is a proceeding *quasi in rem*; and the thing proceeded against must be brought within the territorial jurisdiction of the court by virtual seizure thereof.

Ward v. *Boyce* (N.Y.), 36 L. R. A. 549, 551.
Douglas v. *Phoenix Ins. Co.* (N.Y.), 20 L. R. A. 118, 121.
Swedish-Am. Nat'l Bk. v. *Bleecker* (Minn.), 75 N.W. 740, 741.
Wile v. *Cohn*, 63 F.R. 759, 765.
Montrose Pickle Co. v. *Mfg. Co.*, 76 Ia. 172.
Western R. Co. v. *Thornton*, 60 Ga. 300.
Bowen v. *Pope*, 125 Ill. 28.
Plimpton v. *Bigelow*, 93 N.Y. 592.
Osgood v. *Maguire*, 61 N.Y. 524.
See also cancelled cases top P. 56 infra

"It may be urged that the garnishee is a resident of the State for the purpose of being sued therein, but garnishment is an attachment and not a suit; and the *res* in such cases is not within the jurisdiction of the court."

Brown on Juris., p. 447.
See also *Creed* v. *Gilman*, 169 Mass. 563, 48 N. E. 778.

In insolvency proceedings the Court had jurisdiction of the debtor, but this was held not to give the Court jurisdiction of the non-resident creditor or of the debt which was owed to him.

Baldwin v. *Hale*, 1 Wall. 223.
Gilman v. *Lockwood*, 4 Wall. 409, 411.
Perley v. *Mason* (N.H.), 4 Atl. 629, 630.

And the Supreme Court of Alabama say: "If a debt due to a non-resident cannot be discharged by an insolvency law or decree of the debtor's State, because of a want of jurisdiction over the creditor and the debt, a like reason should forbid its discharge by garnishment proceedings."

Louisville & N. R. Co. v. *Nash* (Ala.), 41 L. R. A. 331, 333.

In taxation proceedings the debtor was also completely subject to the dominion and control of the State, but this was held not to give the State any dominion or control over the non-resident creditor or the debt which was owing to him.

State Tax on Foreign-Held Bonds, 15 Wall. 300, 320-1, 325-6.

(e) *No solution of the problem in duality of the word debt.*

Mr. Waples, author of "Waples on Attachment and Garnishment," has written a short monograph, or polemical review of the authorities, on the law of debtor and creditor relative to the situs of debt, in an endeavor to find some ground on which garnishment might be sustained as against a non-resident principal defendant not served with process. He recognizes the fact that courts have been in conflict for many years about the place of debt, and never more so than at the present time (sec. 1); and that text writers and judges have

often expressed themselves very strongly on the difficulties of the problem and the unsettled state of the law (sec. 2). He also recognizes the fact that the various grounds on which courts have attempted to sustain garnishment in such cases are not only unsound but inconsistent, in that they treat the debt as in one place for one purpose and elsewhere for another, or as subject to be changed from one place to another by legislation, or deny the debt any situs at all, or treat its presence within the court's jurisdiction as fictitious to subserve the ends of garnishment. And he well says, that any solution of the problem, to be of practical value, must relieve from the necessity of such inconsistent treatment (sec. 3).

He suggests that the key to the solution is the duality of the word debt. Of this suggestion, however, he somewhat modestly remarks that "in view of the protracted conflict of the courts on a question frequently, and even usually, characterized as a problem of great difficulty, it seems almost presumptious to suggest that the key to its solution is the duality of the word debt" (p. 302). But he finds ground for reassurance and confidence, in quotations, which he makes as follows: "To quote the remark attributed to Czolbe: 'The profoundest riddles of the world have often remained concealed, not because of their great intricacy, but because of their exceeding simplicity.' And Shelling, more pointedly and wittily, says: 'When truth is found, it always proves somewhat like the egg of Columbus'" (p. 302).

Apart from the question of the correctness of his theory, the work will be found of assistance in an examination of the law in the case at bar, in that many of the authorities, pro and con, and especially those strongly tending to support our position, are there reviewed separately and with a fullness of statement that could not be permitted or thought of even in an ordinary brief or argument.

But with all due respect and deference, and while we agree with him in his criticism of the various grounds on which the courts have attempted to sustain garnishment, as unsound and inconsistent, we submit that the ground which he suggests is also unsound and untenable. In a word, his position is this: He attempts to extend to mere debts the distinction, applicable to lands and chat-

tels, between the title and the land or chattel itself. As in the case of lands and chattels, the title or claim is one thing and the lands or chattels themselves, or the thing claimed or owned, is another; so in the case of a debt, he contends, the right or claim, the chose in action, is one thing, and the thing claimed, the money due or withheld, is another thing. The former, the chose in action, is with the creditor; the latter, the debt property, is with the debtor.

The difficulty with this position and distinction is that it cannot be maintained. The author is so unfortunate as to be under the necessity of criticizing all of the decisions, in taxation as well as garnishment, and whether pro or con.

Perhaps the cases that afford the best illustration of his contentions are *Railroad Co.* v. *Maggard*, 6 Colo. App. 85, 39 Pac. 985, and *Everett* v. *Walker*, 4 Colo. App. 509, 36 Pac. 616. In the first case, the garnishee admitted that it owed the principal defendant $130, and actually paid that amount into court; in the second case, the insurance company had forwarded the amount due to Mrs. Walker to its agent in Colorado, where the writ of garnishment issued. But in both cases it was correctly held that the garnishment could not be maintained, the garnishee being a foreign corporation and the principal defendant a non-resident.

In criticizing these decisions, and in explanation of his own theory, Mr. Waples says: "Everett did not attach any chose in action belonging to Mrs. Walker or anybody else; he surmised that the company had money of hers which it was detaining from her; he attached in the company's hands before the debt money had become specific, it is true; but when the indebtedness had been disclosed and the garnishee charged to hold, there can be little doubt that the debt would have materialized and would have had a situs right in the registry of the court, had not the garnishee been discharged. Its place was in the garnishee's pocket, as he went away discharged. It would not have its actual place with Mrs. Walker till paid over to her" (p. 272).

Neither would it have been Mrs. Walker's money till actually paid over to her. The assumption to the contrary is the fundamental and fatal error in Mr. Waples' theory. In *Ware* v. *Hylton*, 3 Dall.

199, the debtor had paid the money to the State; but that did not discharge his obligation to the British creditor. It is obvious that money which does not become the principal defendant's property till paid over to him, is not subject to garnishment as his property before such payment.

See *Natl. Revere Bank* v. *Bay State, etc., Co.* (N.H.), 40 Atl. 255.

If the garnishee had had property belonging to the principal defendant, the attachment would have been good. The distinction has often been pointed out.

See 32 Am. L. Rev., pp. 40-1.

But in the Colorado cases the garnishee had no property or money belonging to the principal defendant. The relation between the garnishee and principal defendant was simply that of debtor and creditor; and, as the Colorado court correctly held, the money in the garnishee's hands was the garnishee's own money and did not belong to Mrs. Walker. And no legal or effective tender could have been made except to Mrs. Walker at her domicile.

Again, while the ground suggested is, in his view, sufficient to sustain garnishment of a debt due to a non-resident, he practically admits, and must concede, that it will not sustain taxation of the same debt. *We regard it as axiomatic that any rule for the support of garnishment of a debt that will not also support taxation of the same debt, is unsound and untenable. Any difficulties that forbid taxation of the debt as against the non-resident creditor will also forbid attachment of the same debt. If the debt is property for attachment in a proceeding quasi in rem, it is property for the purpose of taxation. And the power and authority of the State to interfere with the contract for its own support is surely as great as its power to do so for the benefit of one of its citizens.*

In the case of *State Tax on Foreign-Held Bonds*, 15 Wall. 300, there was this same so-called debt property in Pennsylvania. The railroad company, the debtor, was a Pennsylvania corporation; and by the Pennsylvania law the company was required, before remitting interest, to take out the amount of the taxes. Here was the debt

and the materialization of it in money for the payment of interest, and a direction to the debtor to deduct therefrom the amount of the taxes. And yet the Pennsylvania statute was held not only repugnant to the Constitution of the United States, but null and void as a law impairing the obligation of contract. And FIELD, J., delivering the opinion of the court, further said: "All the property there can be, in the nature of things, in the debts of corporations, belongs to the creditors, to whom they are payable and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. . . . It is, in fact, a forced contribution levied upon property held in other States, where it is subjected, or may be subjected, to taxation upon an estimate of its full value."

As stated by LURTON, J., in the passage hereinbefore quoted: "The actual situs is not here; and to sustain the jurisdiction we must create a fictitious or constructive situs, based upon the notion that debts are in some way property in the hands of the debtor, or, that the security for the debt being here, therefore the debt is here. By no sort of fiction can the jurisdiction of the State be held to extend to the property which a non-resident has in a debt which he holds against a resident. The creditor cannot be taxed, because he is not within the jurisdiction, and his property cannot be taxed, because it is not within the jurisdiction." (See *ante*, p. 24.)

The Supreme Court of Illinois state it correctly when they say: "Since the only property right which there can be in a debt is a mere right to receive payment of it, it is impossible that there can be anything of a tangible nature connected with such right which can occupy locality; and so the property right must accompany and remain with the person of the owner of the debt, and therefore it cannot be in this State when the domicile of the owner is in another State."

Cooper v. *Beers* (Ill.), 33 N.E. 61, 62.

In the case of a mere debt, therefore, any attempt to make out that there is property of the principal defendant's in the hands of the garnishee must fail. We regard as decisive on this point the cases

under subd. (*d*) (*supra*, pp. 41-4), and especially the cases on taxation (*supra*, pp. 18, 21-5).

(f) That the situs of the debt is at the domicile of the creditor and not that of the debtor is also established by those authorities wherein it is held that assignees in insolvency may have enjoined such so-called attachment proceedings pending in another State in violation of the insolvency laws, or may recover from the garnisher the money so collected.

The fundamental ground upon which a creditor may be enjoined from prosecuting an attachment suit is that his claim or title to the property is inferior to that of the assignee.

Reno, Non-Res., secs. 173-5, 170-2 and cases.
HOLMES, J., *Chipman* v. *Manuf. Natl. Bank*, 156 Mass. p. 148.
BIGELOW, C.J., *Dehon* v. *Foster*, 7 Allen, p. 58.
Cf., *Phillips* v. *Hunter*, 2 H. Bl. 410, 411, EYRE, C.J., dis. opin.
Green v. *Van Buskirk*, 7 Wall. 139.
Moore v. *Bonnell*, 31 N.J. L. 98-9.

It is now well settled, at least with respect to debts or credits owned by the insolvent, that an attachment suit pending in a State other than that of the insolvent assignment is not entitled to full faith and credit in the State of the assignment when the attaching creditor is also a citizen of that State. Hence the assignee may have a home creditor enjoined from prosecuting his attachment suit in such other State, and the decree enjoining him does not contravene any clause of the federal constitution.

Reno, Non-Res., sec. 171.

Even though the attachment was made before the assignment or the institution of the insolvency proceedings.

Dehon v. *Foster*, 4 Allen, 545; 7 id. 57.
Cunningham v. *Butler*, 142 Mass. 47.
Cole v. *Cunningham*, 133 U.S. 107.

Or the assignee may recover from the home creditor the amount of the debt so collected.

Sill v. *Worswick*, 1 H. Bl. 665.
Phillips v. *Hunter*, 2 H. Bl. 403, 405-6, 409.
Hunter v. *Potts*, 4 T. R. 182.
Hazen v. *Bank* (Vt.), 41 Atl. 1046.

Certain cases in which such recovery has been denied,

Thompson v. *Tetley* (N.H), 41 Atl. 179,
Lawrence v. *Batcheller*, 131 Mass. 504,
Proctor v. *Bank*, 152 Mass. 223,
Credit Co. v. *Hunter*, 3 Ch. App. 479,

although suggesting that such recovery might be barred by the judgment in garnishment, really proceed on the ground that there was no statute authorizing such recovery by the assignee in insolvency, and that a court of law will not always afford a remedy for the doing of that which a court of equity would have prevented.

See *Cole* v. *Cunningham*, 133 U.S. 33 L. ed., p. 548.

And this view is confirmed by the fact that such recovery is sustained when authorized by statute, as in attempts to evade exemption laws by garnishment in another State. See *infra*, p. 55 and cases there cited.

The rule with respect to lands and chattels is believed to be different. For while, as between citizens of the State, the Court may doubtless enforce the law of the State on the assumption and rule that all personal property follows the person of the owner, yet lands and chattels are capable of having an actual situs separate and apart from the domicile of the owner. And as the State in which lands and chattels are actually situated has jurisdiction over them, even when they belong to a non-resident, any right or title acquired by the attaching creditor under the attachment laws of that State, and which is there recognized as superior to the title of the assignee in insolvency, would seem to be valid and entitled to full faith and credit in other States, whatever the local law of the other State or the citizenship of the parties may be.

Reno, Non-Res., sec. 174 and cases.
Green v. *Van Buskirk*, 7 Wall. 139.
Melhop v. *Doane*, 31 Ia. 397.

Chipman v. *Manuf. Natl. Bank*, 156 Mass. 147.
Chipman v. *Peabody*, 159 Mass. 420.

The title so acquired is unaffected by the question of citizenship.

Green v. *Van Buskirk*, 7 Wall. 139, 151.

(g) That the situs of the debt is at the domicile of the creditor and not that of the debtor is also established by those authorities wherein it is held that the creditor may have enjoined such so-called attachment proceedings pending in another State in evasion of exemption laws, or may recover from the garnisher the amount of the debt so collected.

For it is the situs of the property that determines what statute shall govern in the matter of exemption.

Mason v. *Beebee*, 44 F.R. 556, 558.
Spindle v. *Shreve*, 111 U.S. 542, 546.

Hence where a debt is contracted in one State by whose law it is exempt from attachment, execution and garnishment, and is held by a citizen of that State, the debt is not subject to garnishment in another State in a proceeding *quasi in rem*.

Wright v. *C. B. & Q. R. Co.*, 19 Neb. 175.
C. B. & Q. R. Co. v. *Moore*, 31 Neb., p. 632.
Pierce v. *Ry. Co.*, 36 Wis. 283.
Bank v. *Ry. Co.*, 45 Wis. 172.
Drake v. *Lake Shore, etc., R. Co.*, 69 Mich. 168.
Railroad Co. v. *Dooley*, 78 Ala. 524.
Ry. Co. v. *Maltby*, 34 Kans. 125.
Ry. Co. v. *Cunningham* (Kans. App.), 51 Pac. 972.
Mason v. *Beebee*, 44 F.R. 556.
Ill. Cent. R. Co. v. *Smith* (Miss.), 19 L. R. A. 577.
Railroad Co. v. *Baker* (Ind.), 24 N.E. 83.
Caledonia Ins. Co. v. *Wenar* (Tex.), 34 S.W. 385.

Contra:

Morgan v. *Neville*, 74 Pa. St. 52.
Mooney v. *Union Pac. R. Co.*, 60 Ia. 346 and cases.
Willard v. *Sturm*, 96 Ia. 555.
Chicago R. I. & P. R. Co. v. *Sturm*, 174 U.S.
Carson v. *Ry. Co.*, 88 Tenn. 646.
Wabash R. Co. v. *Dougan*, 142 Ill. 248 and cases (changed by statute in Ill. 31 N.E. 597.)

All cases agree that where there is any statutory peculiarity pertaining to the indebtedness sought to be garnished, such as that it should not be subjected to such process, and where both the principal defendant and garnisher live in the same State, the principal defendant is entitled to an injunction to prevent the garnisher from attaching such debt in another State, notwithstanding he may there find the garnishee as a resident of such other State where the peculiarity or exemption does not obtain.

Keyser v. *Rice*, 47 Md. 203.
Snook v. *Snetzer*, 25 Oh. St. 516.
Teager v. *Landsley*, 69 Ia. 725.
Hager v. *Adams*, 70 Ia. 746.
Mumper v. *Wilson*, 72 Ia. 163.
Wilson v. *Joseph*, 107 Ind. 490.
Engel v. *Scheuerman*, 40 Ga. 206.
Zimmerman v. *Franke*, 34 Kans. 650.
Kelley v. *Siefert*, 71 Mo. App. 133.
Moton v. *Hull*, 77 Tex. 80.

Or in such case the judgment debtor may recover the amount of the debt so collected and appropriated, especially if such recovery is authorized by statute.

Steele v. *McKerrihan* (Pa.), 33 Atl. 570.
Kestler v. *Kern* (Ind.), 28 N.E. 726.
Main v. *Field* (Ind.), 40 N.E. 1103.
Teager v. *Landsley*, *ubi supra*.
Snook v. *Snetzer*, *ubi supra*.
Hager v. *Adams*, *ubi supra*.
Stark v. *Bare*, 39 Kans. 100.
Singer Mfg. Co. v. *Fleming*, (Neb.) 23 L.R.A. 210.
Bishop v. *Middleton* (Neb.), 26 L.R.A. 445.
Griggs v. *Doctor* (Wis.), 30 L.R.A. 360.

Or may recover of the garnishee, notwithstanding the judgment in garnishment and payment of the same by the garnishee.

Louisville & N. R. Co. v. *Nash* (Ala.), 41 L.R.A. 331.
Bucy v. *Kans. City, M. & B. R. Co.* (Miss.), 22 So. 296.
Mo. Pac. R. Co. v. *Sharitt*, 43 Kans. 375.
Chicago R. I. & P. Ry. Co. v. *Sturm* (Kans. App.), 49 Pac. 337.

Contra:

~~*Nat. Tr. Co.* v. *Chattanooga R. & C. R. Co.*, 68 F.R. 685, 688-8.~~

~~*Nat'l. Bank* v. *Fartick* (Del.), 42 Atl. 479, 481.~~

C. B. & Q. R. Co. v. *Moore*, 31 Neb. 629.

O'Connor v. *Walter* (Neb.), 23 L. R. A. 650.

Eddy v. *O'Hara*, 132 Mass. p. 62.

Connor v. *Hanover Ins. Co.*, 28 F.R. 549.

Hunter v. *Potts*, 4 T.R. 182.

Phillips v. *Hunter*, 2 H. Bl. 403.

Va., etc., Ins. Co. v. *N. Y., etc., Mfg. Co.* (Va.), 40 L. R. A. 237.

Chicago R. I. & P. Ry. Co. v. *Sturm*, 174 U.S.

~~32 Am. L. Rev., pp. 44 *et seq.* and cases.~~

If the debt had been property at the domicile of the debtor or place of the so-called attachment, the requirement of full faith and credit would have prevented such recovery. (*Green* v. *Van Buskirk*, 7 Wall. 139, 151; see also Waples, Debtor & Creditor (Situs of Debt) sec. 275). But neither the so-called attachment proceedings nor the judgment against the garnishee therein were entitled to full faith and credit; because the court was without jurisdiction, either *in personam* or *in rem*, and was simply reaching over and attempting to affect property in another state. This is very clearly and emphatically pointed out by the Supreme Court of Nebraska. The Court says:

> "If the courts of Iowa should seek to prosecute a citizen of Nebraska who does not come within their jurisdiction, and to reach over into Nebraska, and take from this State the property of that citizen here located, can any one for a moment urge, or seriously consider, that our legislature and courts, in order to give full faith and credit to the judicial proceedings of Iowa, must stand idly by and countenance such a proceeding? Must we permit our laws to be nullified and evaded, in order to sustain the courts of another State in overreaching their jurisdiction, in refusing to exercise a comity elsewhere accorded sister States, and in seizing the property in Nebraska of citizens of Nebraska who have not brought themselves within the lawful reach of the Iowa courts? . . . That is precisely the position of the defendant in error here. His property which was seized was in Nebraska, and subject to the jurisdiction of our courts, and not those of Iowa." (23 L.R.A. 213.)

Again the court say:

> "The tort consisted in seizing property in Nebraska, exempt under the laws of Nebraska. The plaintiff in error was enabled to do this by instituting proceedings in another State. But the tort consisted not in instituting those proceedings in Iowa. A suit might rightfully be begun there *in personam* had Fleming brought himself within the jurisdiction of the Iowa courts. No action would have arisen had the property attached been situated in Iowa, or in a State other than Nebraska; but the wrong was in seizing a debt situated in Nebraska, payable in Nebraska, to a citizen of Nebraska." (23 L. R. A. 214.)

(h) That the situs of the debt is at the domicile of the creditor and not that of the debtor is conceded, if not established, by those cases which have attempted to lay down the law which should govern where the debtor has been garnished in one State and sued by the creditor himself in another State.

For these cases concede that there is no property at the domicile of the debtor which can be made the subject of a proceeding *quasi in rem*, to which the courts of other States are bound to give full faith and credit; on the contrary, they treat both as mere suits and assert that the effect to be given to either as against the other depends entirely upon the mere question of priority of suit.

This was another point on which the decisions were remarkably uniform at first, owing no doubt to the prestige of the courts by which the law was first declared. And while both proceedings were correctly enough, put on a par as nothing more than mere suits it has since been demonstrated that the principle on which the cases were decided is entirely inapplicable, and as applied to mere suits clearly erroneous.

The cases may be conveniently considered under two divisions:

First, suits by the creditor against his debtor in which the court having jurisdiction of the same yielded to a prior garnishment in respect of the same debt in the courts of another State, of which the first and leading cases in this country is—

Embree v. *Hanna*, 5 Johns. 101 (1809), KENT, C.J.

The defendant Hanna, a resident of Baltimore, Md., was indebted

to Embree on book account for $250.38. One of Embree's creditor's attached the debt in Hanna's hands in Maryland, pursuant to the laws of that State, which permitted a non-resident creditor to attach the goods and "credits" of a non-resident debtor. Subsequently the defendant was sued and arrested in New York for the same debt. The defendant pleaded the attachment proceedings, and it was agreed that if this was a good plea, either in abatement or bar, the plaintiff was to be nonsuited, otherwise judgment was to be entered on the verdict. It was held that such a plea in abatement was good.

The principle of the holding is clearly erroneous.

The case was "decided in 1809, upon the authority of English cases which referred to domestic actions, and upon the ground that a garnishee could not otherwise be protected," and held "that a plea in abatement was good." "The decision was made before the law in this country had been settled that the courts of the States are to be considered as foreign to each other, and the courts of the United States as foreign to those of the States in this matter."

> LOWELL, J., *Lynch* v. *Hartford F. Ins. Co.*, 17 F.R. 627, 628.
> See also *Dwight* v. *Cent. Vt. R. Co.*, 9 F.R. 785, 789.
> *Willson* v. *Milliken* (Ky.), 42 L. R. A. 449 and cases.

And it has since been settled that the pendency of a suit in one jurisdiction is no defence, and cannot be pleaded in abatement to the pendency of a suit in another jurisdiction, even though between the same parties and for the same subject matter.

> *Stanton* v. *Embrey*, 93 U.S. 548.
> *Gordon* v. *Gilfoil*, 99 U.S. 168.

And that in such suits where both courts had jurisdiction, a judgment in one is necessarily conclusive in the other, and is a perfect protection, irrespective of the question of priority.

> *White* v. *Burger* (Me.), 4 Atl. 694 and cases.
> *Capwell* v. *Sipe*, 51 F.R. 667.
> *Paine* v. *Ins. Co.*, 11 R.I. 411, 413.
> *Ins. Co.* v. *Harris*, 97 U.S. 331.

Green v. *Sarmiento*, Fed. Cas. No. 5,760.
Stout v. *Lye*, 103 U.S. 66.

The reason of the holding is also clearly erroneous.

The reason of the holding was that such a rule is necessary to protect the garnishee from compulsory double payment.

Hence, it has been held, "the reason of that decision does not apply" where "there is no danger of a compulsory double payment."

EARL, J., *Williams* v. *Ingersoll*, 89 N.Y. 508, 524.

The Court, in *Embree* v. *Hanna*, necessarily looked for authorities to the English decisions. Those decisions recognized the validity of a discharge under the custom of London and similar laws. It is to be remembered, however, that the custom of London had been confirmed by Parliament, so that on principle a discharge in pursuance thereof was as good in other parts of England as in London itself; and in upholding the validity of such a discharge as against non-residents or foreigners, the English courts were but applying a doctrine which they had always recognized, nay, even asserted, viz., the right and power of any court or nation to discharge contracts with non-residents, provided only the contracts were made or to be performed at the place of discharge (see also per Lord CAMPBELL, C.J., *De Haber* v. *Queen of Portugal*, 17 Q.B. 191, 213; *Mayor, etc., London Cox*, L.R. 2 H. L. Cas. 239),—a doctrine which, although for a time recognized and asserted by some of the legislatures and courts of this country, has since been entirely repudiated and condemned as untenable, especially as between the States.

But while the English decisions thus recognized the validity of such a discharge, they afforded no way of protection to the garnishee, other than by a plea of payment under the custom. There was a mere dictum of Lord HOLT, in *Brook* v. *Smith*, 1 Salk. 280, to the effect that garnishment was pleadable in abatement; but there was no decision to that effect and the later decisions were directly to the contrary. (*Smith* v. *Ogle*, 6 Taunt. 74; *Nathans* v. *Giles*, 5 Id. 558; *Cf. Magrath* v. *Hardy*, 4 Bing. n. c. 782; *Wetter* v. *Rucker*, 1 B. & B. 491; *Crosby* v. *Hetherington*, 4 M. & Gr. 933.) On the English decisions, therefore, the Court was forced to put its decision

upon the ground that such a rule was necessary for the protection of the garnishee.

The Court entirely overlooked the numerous provisions of the Constitution of the United States and Laws of Congress for the protection of the rights of citizens of one State as against the encroachments of other States in behalf of their own citizens, which provisions were amply sufficient for the protection of the rights both of the garnishee and of the non-resident creditor. This is perhaps not surprising, for it is doubtless true that the extent and efficacy of those provisions were little, if at all, appreciated or understood at that time. *Embree* v. *Hanna* was decided in 1809, nearly twenty years before the Supreme Court of the United States in *Ogden* v. *Saunders* astonished the various State courts and legislatures with the declaration of law that one State could not, by its insolvency laws, discharge a debt due to a citizen of another State, even though the contract was made within the State after the passage of the law; more than fifty years before all question of that law was put to rest in *Baldwin* v. *Hale*; more than sixty years before it was established by this Court that a State could not tax a debt due to a citizen of another State, because not property at the domicile of the debtor; more than sixty years also before it was established by this Court that a State could not deprive even a foreign corporation of its rights to resort to the federal courts; nearly seventy years before this Court, in *Pennoyer* v. *Neff*, again surprised certain State courts and legislatures with the declaration of law that a judgment against a non-resident rendered without jurisdiction of the person or property, even though property was within the territorial jurisdiction of the court, was a mere nullity and not entitled to full faith and credit; and more than ninety years before this Court, in *Blake* v. *McClung*, 172 U.S. 239, declared null and void State legislation attempting to give its own citizens a preference over non-resident creditors in the distribution of the assets of an insolvent foreign corporation. (See also *Belfast Savings Bank* v. *Stowe* (C.C.A. 1st), 92 F.R. 100. *Maynard* v. *Granite State Prov. Ass'n* (C.C.A. 6th), 92 F. R. 435. *Cf.*, *Jones* v. *Sands* (C.C.A. 2d), 79 F.R. 913, 914.) History shows that the States and State courts have been slow to

appreciate and understand the extent and efficacy of those provisions. In *Embree* v. *Hanna*, the court did not even notice that there were any such provisions.

It is sufficient to say that if the "credits," the attachment of which was authorized by the law of Maryland, were property in Maryland, the New York courts were bound to give full faith and credit to those attachment proceedings and could not compel the debtor to pay twice as if no such proceedings were pending, and that, too, irrespective of the question whether the attachment proceedings were prior or subsequent. (*Green* v. *Van Buskirk*, 7 Wall. 139.) On the other hand, if those "credits" were not property in Maryland, the Maryland Court had no jurisdiction and the attachment proceedings were therefore null and void (*Pennoyer* v. *Neff*, 95 U.S. 714), and not entitled to full faith and credit (*Thompson* v. *Whitman*, 18 Wall. 457; *Cole* v. *Cunningham*, 133 U.S. 107; *Simmons* v. *Saul*. 138 U.S. 439, 448; *Hekking* v. *Pfaff* (C. C. A. 1st), 91 F.R. 60, 61-2); and hence the Maryland Court would be bound to give full faith and credit to the New York proceedings, and, especially after the debt was merged in judgment, could not charge the garnishee as if no such proceedings were pending. (See authorities, *infra*, p. 72-3.) It could not then charge the garnishee on the original debt, because that would be merged in the judgment (Id.). And it could not charge the garnishee on the judgment, as a judgment is not subject to garnishment by process from any other court than that in which the judgment was rendered. (*Hamill* v. *Peck* (Colo.), 52 Pac. 216; *Scott* v. *Rohman* (Neb.), 62 N.W. 46; *Tourville* v. *Wabash R. Co.* (Mo.), 50 S.W. 300; *Renier* v. *Hurlburt*, 81 Wis. 24; *Harvey* v. *Min. Co.*, 15 F.R. 649; *Thomas* v. *Wooldridge*, Fed. Cas. No. 13,918.)

It is a mistake to assume or suppose that the garnishee is without protection under the Constitution and laws of the United States. If the court in garnishment has no jurisdiction as against the non-resident creditor, then any payment by the garnishee would be a payment of his own money and not of the money or property belonging to the principal defendant. A judgment compelling this cannot be called due process of law. "If the law was valid, the

usual and ordinary process was adopted. If it was not valid, the defendant was deprived of his property without due process of law." (*Holden* v. *Hardy* (Utah), 37 L. R. A. 103, 105.) As the Supreme Court of Delaware say: "The contention that the garnishee cannot thus attack the judgment is not supported by any well considered case. In a suit by attachment the Court must acquire jurisdiction and proceed to enter a judgment before it can pronounce any judgment against the party summoned as garnishee. If the previous proceedings are unauthorized and void, there is no sufficient basis to support a judgment against the garnishee." (*Natl. Bank* v. *Furtick* (Del.), 42 Atl. 479, 485). Under sec. 2, art. 4, of the Constitution, the garnishee is entitled to all privileges and immunities of citizens of the several States, which forbids that the courts of his own State even should so deal with the debt which he owes to a non-resident, that he must either remain at home or subject himself to compulsory double payment. And under sec. 1 of the 14th Amendment, the garnishee is made a citizen of the United States as well as of the State where he resides; and the State is forbidden (1) to *make* or *enforce* any law which shall abridge the privileges or immunities of citizens of the United States; (2) to deprive any person of life, liberty or property without due process of law; or (3) to deny to any person within its jurisdiction the equal protection of the law. "The 14th Amendment, which was finally adopted July 28, 1868, largely expanded the power of the federal courts and Congress, and for the first time authorized the former to declare invalid all laws and judicial decisions of the States abridging the rights of citizens or denying them the benefit of due process of law." (*Holden* v. *Hardy*, 169 U.S, 366, 382.) "While . . . the primary object of this amendment was to secure to the colored race, then recently emancipated, the full enjoyment of their freedom . . . a majority of the cases which have since arisen have turned, not upon a denial to the colored race of the rights therein secured to them, but upon alleged discriminations in matters entirely outside of the political relation of the parties aggrieved." (169 U.S. 382-3.)

The rights of both parties, therefore, were amply protected, and the reason for the holding does not in fact exist.

Second, suits by the creditor against his debtor in which the Court having jurisdiction of the same refused to yield to a subsequent garnishment and so-called attachment of the debt in the courts of another State or jurisdiction, of which the first and leading case is —

Wallace v. *McConnell*, 13 Pet. 136 (1839).
See also *Whipple* v. *Robbins*, 97 Mass. 107.
Am. Bank v. *Rollins*, 99 Mass. 313.

In the first two of the above cases the so-called attachment of the debt at the domicile of the debtor, but without personal jurisdiction of the non-resident creditor, nay even payment under such an alleged attachment, was held to constitute no defence on behalf of the garnishee to the prior suit which the creditor himself had brought against his debtor for the recovery of the same debt, in the Federal Court in the same State in one case, and in the court of another State at the domicile of the creditor in the other case. In the third, a so-called attachment of the debt in Massachusetts, at the domicile of the debtor, but without personal jurisdiction of the non-resident creditor, was made to yield to the prior suit which the creditor had himself brought against his debtor for the same debt in Maine, the domicile of the creditor.

On the facts those cases were correctly decided. They indirectly, if not directly, establish the principle for which we contend, viz., that the debt is not property at the domicile of the debtor, and therefore cannot be made the subject of a proceeding *quasi in rem* which would be entitled to full faith and credit in the courts of another State.

For if the creditor's property in the debt had been at the domicile of the debtor, the attachment would have been valid, and the courts of other States would have been bound to give full faith and credit to it, even though subsequent.

Green v. *Van Buskirk*, 7 Wall. 139.

The courts of the several States, when the property was actually within the State and the attachment proceedings were on behalf of

a domestic creditor, have uniformly refused to recognize an attempted involuntary assignment of the property by the courts of other States, though the attachment proceedings were instituted subsequent to and with full notice of the involuntary transfer. See Record, pp. 139-40 and cases there cited.

And it is only when the property was within the jurisdiction of the Court making the involuntary transfer that the courts of other States are bound to give full faith and credit to such transfer, and are thereby debarred of subsequent action.

Crapo v. *Kelly*, 16 Wall. 610.
Green v. *Van Buskirk*, 7 Wall. 139.
R'v'g *Van Buskirk* v. *Green*, 13 Abb. 145, 2 Keyes, 119.

In *Wallace* v. *McConnell*, it is true, the Court, quoting for the most part the language of KENT, C.J., in *Embree* v. *Hanna*, speak of the garnishment as creating a "lien upon the debt," "which the courts of all other governments, *if they recognize such proceedings at all*, cannot fail to regard." But those statements are mere *dicta*. And it is obvious that the validity and effect of an attachment of property in one State does not depend upon whether other States "recognize such proceedings." Under the Federal Constitution other States are obliged to give full faith and credit to them, provided only the Court in the attachment had jurisdiction of the property.

Green v. *Van Buskirk*, *ubi supra*.

It is worthy of note that the Supreme Court of the State whose attachment proceedings were refused recognition in *Wallace* v. *McConnell*, has since wholly repudiated such so-called attachments, and now refuses to "recognize such proceedings at all."

Louisville & N. R. Co. v. *Nash* (Ala.), 41 L. R. A. 331, 23 So. 825.

The rule suggested in the above cases is that the proceeding first begun is entitled to prevail, that it is wholly a question of priority of suit. And this rule also clearly recognizes the soundness of the proposition for which we contend, for it puts the garnishment and

suit upon the same level as mere suits, and correctly so, for that in case of a mere debt or pecuniary obligation there is any property that can be made the subject of a proceeding *quasi in rem* without personal jurisdiction of the non-resident creditor, is absurd. They are both suits, one by the creditor for his own benefit, and the other by the creditor for the benefit of the garnisher. Hence the conflict. The garnishment order does not transfer the debt, or make the garnisher a creditor of the garnishee.

No. Chicago R. Mill Co. v. *St. Louis, Ore. & S. Co.*, 152 U.S. 618 and cases.

Even if the rule laid down in these cases were applicable and controlling in the case at bar, the plaintiffs in error would be entitled to prevail because the insolvency proceedings were commenced first, —the insolvency proceedings on the 12th and the alleged attachment proceedings on the 13th of August, 1889.

Under the rule it is the commencement of the suit or proceeding that is made the decisive and controlling fact.

> "The doctrine in question is not limited in its application to cases where property has actually been seized under judicial process before the second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all other suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume possession and control of specific, personal or real property."

Merritt v. *Am. Steel Barge Co.* (C. C. A. 8th), 79 F.R. 228, 231.

But the defendant in error may urge that, under the laws of Massachusetts, August 23 was the date of the commencement of the insolvency proceedings, as this was the date of the first publication of the notice of issuing the warrant, and section 46 provides that "the assignment shall vest in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned or conveyed, or which might have been taken on execution by a judg-

ment against him *at the time of the first publication* of the notice of issuing the warrant." But it is clear that this marks, not the commencement of the proceedings, but the division between the ownership of the assignee in reference to the past, and the ownership of the insolvent in respect to the future acquisitions of the insolvent. It would be just as reasonable to point to another provision in the same section, which provides that the assignment "shall be effectual . . . to dissolve any attachment on mesne process made not more than four months prior to the time of the first publication aforesaid," and say that the commencement of the proceedings was four months before the date of the first publication. The fact is, that the assignment is effectual as against an attachment made not more than four months prior to the date of the first publication of the notice of issuing the warrant, and passes all property acquired by the debtor up to the date of the first publication, but the commencement of the proceedings is the filing of the petition. Under the recent United States Bankruptcy Act, the title of the trustee relates back only to the date of the adjudication (sec. 70), but that does not make the adjudication the commencement of the proceedings. On the contrary, the commencement of the proceedings is, and is expressly declared to be, the date when the petition was filed (sec. 1 (10)). It is obvious that proceedings must be commenced before the court can "adjudicate"; and one obvious difference between a voluntary and an adverse applicatoin is, that in the former the debtor submits himself and his property in the outset to the jurisdiction of the court as an insolvent under the law.

Whitehead v. *Mallery*, 4 Gray, 180, 183.
Mass. Pub. Sts., ch. 157, sec. 16 *et seq.*

But the principle is not applicable, because in garnishment by foreign attachment of debts due to non-residents no fund or property passes into the jurisdiction of the court from which garnishment process issues the possession of which could be disturbed by proceedings in another court; and all the court in garnishment can do is to render a personal judgment against the garnishee for the sum due.

SHIRAS, Dist. J., *Deming* v. *Orient Ins. Co.*, 78 F.R. 1, 3-5 and cases.
Lancashire Ins. Co. v. *Corbetts* (Ill.), 46 N.E. 631, 632, 635.
Natl. F. Ins. Co. v. *Chambers* (N.J. Eq.), 32 Atl. 663.

And what is more directly in point and decisive of the case at bar the rule does not apply, because the court acquired no jurisdiction, *in rem* or *in personam*, by the so-called attachment proceedings.

Louisville & N. R. Co. v. *Nash* (Ala.), 41 L. R. A. 331.
Douglas v. *Phoenix Ins. Co.*, 138 N.Y. 209, 20 L. R. A. 118.
Natl. Bank v. *Furtick* (Del.), 42 Atl. 479, 482, 484.
Dowling v. *Corbetts* (Wis.), cited in
Lancashire Ins. Co. v. *Corbetts* (Ill.), 46 N.E. 631, 635.
Caledonia Ins. Co. v. *Wenar* (Tex. App.), 34 S. W. 385.
Continental Ins. Co. v. *Chase* (Tex. App.), 33-602.
See also cases *infra*, pp. 68, 69.

If the court acquired no jurisdiction by the so-called attachment proceeding, there is no law or power that requires, or can require, the courts of other States to give full faith and credit to such proceedings, whether prior or subsequent.

Thompson v. *Whitman*, 18 Wall. 457.
Cole v. *Cunningham*, 133 U.S. 107.
Simmons v. *Saul*, 133 U.S. 439, 448.
Hekking v. *Pfaff* (C. C. A. 1st), 91 F.R. 60, 61-2.

It is not surprising, therefore, that the rule, instead of protecting the garnishee from compulsory double payment, has resulted, in numerous instances, in inflicting a double liability upon the garnishee. Chief Justice KENT sustained the rule by denying his own undoubted jurisdiction and recognizing the asserted jurisdiction of a court that was without jurisdiction. In *Wallace* v. *McConnell* and *Whipple* v. *Robbins*, the Court sustained its own jurisdiction, and, indirectly, the rule, but at the expense of inflicting a double liability upon the garnishee. Massachusetts has several times been obliged to complain at the non-observance of the rule by other courts,—in several cases contenting itself with the assumption that the action of the other court would have been different if the trustee had made a full dis-

closure, and in other cases being obliged to discharge the trustee, notwithstanding the priority of its own so-called attachment proceedings. And, in numerous cases, courts have refused to adopt the rule, for the reason that the court acquired no jurisdiction of the debt by the so-called attachment.

Douglas v. *Phoenix Ins. Co.*, 138 N.Y. 209.
Alley v. *Douglas* (Mass.), not reported.

Osgood v. *Maguire*, 61 N.Y. 524 (1875).
Folger v. *Ins. Co.*, 99 Mass. 267 (1868).
Taylor v. *Ins. Co.*, 14 Allen, 353 (1867).

McCarty v. *City of New Bedford*, 4 F.R. 818, 819, 831-2.
Eddy v. *O'Hara*, 132 Mass. 56, 57, 61.

Hull v. *Blake*, 13 Mass. 153 (Nov. 19, 1811).
Fisk v. *Billings*, *Blake Tr.* (Ga.), not reported (Nov. 21, 1811).

Ward v. *Boyce*, 152 N.Y. 191.
Herrick v. *Ward*, *Boyce Tr.* (Vt.), not reported.

Martin v. *Cent. Vt. R. Co.*, 20 N.Y. St. R. 375.
Kelly v. *Martin*, *Cent. Vt. R. Co. Tr.* (Vt.), not reported.

Dowling v. *Corbetts* (Wis.), cited in. —
Lancashire Ins. Co. v. *Corbetts* (Ill.), 46 N.E. 631, 635.

Am. Cent. Ins. Co. v. *Hettler*, 37 Neb. 849.
Am. Cent. Ins. Co. v. *Hettler*, 46 Ill. App. 416, 417.

Mo. Pac. R. Co. v. *Sharitt*, 43 Kans. 375.
Stewart v. *Sharitt*, *Mo. Pac. R. Co. Tr.* (Mo.), not reported.

Chicago, R. I. & P. R. Co. v. *Sturm*, 5 Kans. App. 427.
Willard v. *Sturm*, *C. R. I. & P. R. Co.*, 96 Ia. 555.

Ill. Cent. R. Co. v. *Smith*, (Miss.), 19 L. R. A. 577, 580, n.
v. *Smith*, *Ill. Cent. R. Co. Tr.* (Ia.), not reported.

Bucy v. *Kansas, etc., R. Co.* (Miss.), 22 So. 296.
v. *Bucy, Kans., etc., R. Co. Tr.* (Tenn.), not reported.

Louisville & N. R. Co. v. *Nash* (Ala.), 41 L. R. A. 331.
v. *Nash, L. & N. R. Co. Tr.* (Tenn.) not reported.

Ala. G. S. R. Co. v. *Chumley*, 92 Ala. 317.
v. *Chumley, Ala. G. S. R. Co. Tr.* (Tenn.)

And other cases.

The editor of a leading set of current annotated reports in a note to one of the above cases, says:

> "It is stated in a letter to us from one of the attorneys for the garnishee in the main case that the Mississippi proceedings were held in Iowa to be no bar to the prosecution of the garnishment in that State, and that, in consequence, the garnishee was compelled to pay twice. If this is a fact, it fitly illustrates the chaotic condition of the law on this subject, and the possibility of such a result is clearly contemplated by the Mississippi Court. The true doctrine seems to us to be that no jurisdiction can be obtained to condemn a debt due to a non-resident unless jurisdiction of his person is obtained. . . . Such a proceeding seems unworthy to be called due process of law." (19 L. R. A. 579-80, note.)

As we have already stated, it is absurd that the rights of a garnishee, a mere stakeholder, can be thus made to depend in all cases upon a rule, the adoption and observance of which, even when there are no real or supposed grounds for disregarding it, is voluntary and in the discretion of the Court. The only way to afford absolute protection to the garnishee is by declaring all such so-called attachment proceedings without jurisdiction of the non-resident or of his property, and all statutes authorizing the same to be repugnant to the Constitution and laws of the United States, and null and void. Thus construed, the Federal Constitution protects the garnishee and his property and the non-resident creditor and his property without adding to or detracting from the rightful jurisdiction or power of either State.

III.

Debt Transferred in Massachusetts and Merged in the Massachusetts Judgment, which was Entitled to Full Faith and Credit.

Not only was the situs of the debt in Massachusetts, but the assignment and transfer of it by the Massachusetts Court of Insolvency to the assignees and by the assignees to King was made and completed in Massachusetts; the transfer, being of a mere chose in action, took effect immediately, and was perfected and completed by the mere assignment and transfer, no delivery of possession being necessary or possible.

Story, Confl. of Laws (7th ed.), sec. 396 and cases.
See also *Conrad* v. *Ins. Co.*, 1 Pet. 449.
Crapo v. *Kelley*, 16 Wall. 641, 21 L. ed. p. 441.

No notice to the debtor was required either by the law of Massachusetts or by the law of Rhode Island.

Frank v. *Babbitt*, 155 Mass. p. 116 and cases.
Noble v. *Smith*, 6 R.I. 446.
Abbott v. *Davidson* (R.I.), 25 Atl. 839, 840 and cases.
Story, Confl. of Laws, *ubi supra*.

Under the laws of Massachusetts, where the contract was both made and to be performed, it was in effect negotiable and subject, on a certain contingency (which in fact happened), to be assigned by operation of law to the assignees of Brown, Steese & Clark, and by those assignees to some purchaser for value, to whom the Lippitt Woolen Company should be alone accountable and indebted on account thereof, and that the purchaser might bring suit thereon in his own name and right.

Mass. Pub. Sts., ch. 157, secs. 44, 46, 51, 109.

The validity, nature, obligation and construction of the contract itself, as well as the validity and effect of the assignment and transfer of the same, were and are to be determined by the laws of Massachusetts, where the contract was both made and to be performed, and where the assignment and transfer thereof was effected.

"Some doctrines are so well settled that it would be a mere waste of time to attempt to defend them. It is, for instance, a principle of public law perfectly beyond the reach of judicial controversy that personal contracts are to have the same validity, interpretation and obligatory force in every other country which they have in the country where they are made or are to to be executed."

STORY, J., *LeRoy* v. *Crowningshield*, 2 Mason, p. 157. See also *Buchanan* v. *Bank*, 55 F.R. 223, 228.

And the rights of the parties to the contract were and are so to be determined under and with reference to the laws of Massachusetts, even in a Rhode Island court, and notwithstanding the fact of garnishment and although the effect of such construction be to show that the debt was not subject to garnishment.

Mason v. *Beebee*, 44 F.R. 556, SHIRAS, D.J.

"The query is, what is to be deemed to be the situs, with regard to the exemption laws of Illinois, of a debt due for wages earned in Illinois by a resident of that State? Why not to such a case apply the general rule that a chose in action has its situs at the domicile of the owner thereof? True, it may be said that this is a fiction of the law which will in many instances be disregarded. Is it, however, any more of a fiction than to hold that the situs of the debt is where the debtor may be found? Fiction or not, it is the primary and general rule, and will govern unless good reason exists for adopting some other guide. . . .

"In passing upon the claim of the intervenor, would not the Court ascertain the fact of the transfer, and, finding that it had been made in Illinois, where both the defendant and the intervenor live, would not the Court apply the law of Illinois in determining whether a legal and valid transfer of the debt had been made, and would it be barred from viewing the transfer in the light of the Illinois law simply because the suit in Iowa had been brought by attachment and garnishment?" (44 F.R. 560, 563.)

"The cases above cited of *Thurman* v. *Stockwell*, *Speed* v. *May*, and *Caskie* v. *Webster*, are, I think, sound law. A chose in action cannot surely be said to have any situs in the place

where the debtor resides; as a general principle, it is payable at the residence of the creditor if not expressed otherwise, and a tender to be good must be made to the creditor. There would seem therefore to be no sound basis for the debtor's State to legislate exclusively as to the legality of a transfer of that debt made by a foreign creditor. In such case, as in all others, where the property transferred does not actually lie within the jurisdiction of another government, a sale or a contract valid where made is valid everywhere."

PECKHAM, J., *Guillander* v. *Howell*, 35 N.Y. 657, 662.

Whether the obligation of the Lippitt Woolen Company was so far negotiable that King could have sued on it in his own name in Rhode Island is immaterial, for it was in effect negotiable, and King could sue on it in his own name in Massachusetts, and having recovered judgment on it in Massachusetts, he is now entitled to sue on that judgment even in Rhode Island.

Talmadge v. *Chapel*, 16 Mass. 71.
Biddle v. *Wilkins*, 1 Pet. 686.
Huntington v. *Attrill*, 146 U.S. 657.
Renaud v. *Abbott*, 116 U.S. 277, 285-9.

The original obligation of the Lippitt Woolen Company was merged in and extinguished by that judgment.

Green v. *Sarmiento*, Fed. Cas. No. 1, 117.
Schuler v. *Israel*, 120 U.S. 506.
Ins. Co. v. *Harris*, 97 U.S. 331.
Whiting v. *Burger*, 78 Me. 287 and cases.
Paine v. *Ins. Co.*, 11 R.I. 411, 413.
Wyman v. *Fabens*, 111 Mass. 77, 80.
Bradford v. *Rice*, 102 Mass. 472.
Sampson v. *Clark*, 2 Cush. 173, 174.
Wolcott v. *Hodges*, 15 Gray, 547.
Ward v. *Johnson*, 13 Mass. 148, 150.
Handrahan v. *Ins. Co.*, 4 Allen, 396.
Husey v. *Crawford*, 152 Mass. 596, 598.

And the Court could not disallow the claim of the adverse claimant or charge the Lippitt Woolen Company, as trustee herein, as if

its obligation had not been merged in and extinguished by that judgment without necessarily denying full faith and credit to the orders, judgments and decrees of the Massachusetts courts, especially the judgment of the Superior Court.

Green v. *Van Buskirk*, 5 Wall. 310; 7 Wall. 139.
Christmas v. *Russell*, 5 Wall. 290.
Crapo v. *Kelley*, 16 Wall. 610, 618-21.
Huntington v. *Attrill*, 146 U.S. pp. 685-6 and cases.

Respectfully submitted,

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